

NO. 35144-7

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JOYCE M. TASKER,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

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COURT OF APPEALS  
DIVISION II  
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**BRIEF OF RESPONDENT**

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## **I. STATEMENT OF CASE**

This appeal involves whether the Department of Health (Department) should be upheld in its determination that Appellant Joyce Tasker engaged in the unlawful “unlicensed practice” of medicine and veterinary medicine when she offered and performed “electrodermal testing” (EDT) on people and animals for the purpose of identifying bodily conditions and then prescribing remedies to improve their health.

### **A. Regulatory Scheme for Unlicensed Practice**

RCW 18 contains licensing statutes for various types of health care providers. Physicians who practice medicine are licensed and subject to regulation of the Medical Quality Assurance Commission. RCW 18.71. Veterinarians are licensed and subject to regulation by the Veterinary Board of Governors. RCW 18.92. Regulations require that to obtain and maintain a license, practitioners must complete educational requirements, pass an examination, and take continuing education courses. Licensed practitioners may be disciplined by their governing boards if they engage in “unprofessional conduct.” RCW 18.130.180.

In addition, the law prohibits persons from performing health care without the legally-required license. Each statute defines a “scope of practice” for the particular profession. The “practice of medicine,” for instance, is defined in RCW 18.71.011. The “practice of veterinary medicine” is defined in RCW 18.92.010. Whenever an unlicensed person engages in activity that falls within the “scope of practice” for a particular

health care profession, he or she has engaged in “unlicensed practice,” and the Department may issue a Cease and Desist Order and impose penalties. RCW 18.130.190. The purpose of RCW 18.130 (“Uniform Disciplinary Act”) is “to assure the public of the adequacy of professional competence and conduct in the healing arts.” RCW 18.130.010. Health-care licensing is a constitutional “exercise of the state’s police power and is reasonably related to public health, safety, and welfare” by preventing the “inadequately trained and educated from practicing in an area where competency is lacking.” Griffith v. Department of Motor Vehicles, 23 Wn. App. 722, 730-31, 598 P.2d 1377 (1979) (non-physician “drugless healer” may not deliver a child since doing so is the “practice of medicine”).

In short, the licensing scheme aims to ensure that health care practitioners are licensed, as qualified to practice, and adhere to certain standards in conducting their practice. In this case, Ms. Tasker argues that she may conduct EDT on people and animals, and provide them with health-care testing and medicines, without any of the regulations that cover licensed physicians and veterinarians.

The reason for prohibiting unlicensed practice, as found by the Presiding Officer, is fear that an unlicensed practitioner will: (1) offer care that is harmful to the customer’s health because they lack expertise; (2) cause persons not to seek needed advice from qualified practitioners; and (3) defraud customers by providing them with worthless treatment in exchange for money. Attachment 1 at AR 2020.



## **B. Electrodermal Testing (EDT)**

This case involves Ms. Tasker's use of EDT. As found by the Presiding Officer (Attachment 1 at AR 2007), Ms. Tasker bought her first EDT device ("Orion") three years ago, and then "upgraded" to a new device ("Asyra"). AR 1583. The EDT technique was developed by West German physician Reinhold Voll in the 1950s. Proponents claim that an EDT device measures the "body's flow of 'electromagnetic energy' along acupuncture meridians." AR 1567. Practitioners use the device to "help select the treatment they prescribe, which usually involve homeopathic products." AR 1566. They claim that they "can determine the cause of any disease by detecting the 'energy imbalance' causing the problem." AR 1566. As found by the Presiding Officer (Attachment 1 at AR 2008), an EDT device typically operates as follows:

The device emits a tiny direct electric current . . . that flows through a wire from the device to a brass cylinder covered by moist gauze, which the patient holds in one hand. A second wire is connected from the device to a probe, which the operator touches to 'acupuncture points' on the patients hand or foot. This completes a low-voltage circuit and the device registers the flow of current.

The information is then relayed to a gauge or computer screen that provides a numeric readout on a numeric scale of 0 to 100. According to Voll's theory, readings from 45 to 55 are normal ('balanced'); readings above 55 indicate inflammation of the organ associated with the 'meridian' being tested; readings below 45 suggest 'organ stagnation and degeneration.' The size of the number actually depends on how hard the probe is pressed against the patient's skin.

AR 1566. The device's manufacturer (AR 1611-18) makes many extravagant claims, including:

- EDT is “probably more reliable” than any other form of allergy testing.
- “In clinical practice” EDT is “useful as diagnostic supplements to blood tests, radiographic imaging” and “characterizing differences between inflammatory and degenerative conditions.”
- “The integration of reliable bioelectric medical instruments into the clinical setting augments the ability to rapidly evaluate tissues which are difficult or impossible to assess by conventional test procedures.”
- Studies show gender and age do not “effect” EDT results, which is “important for considering in using these measurements for medical diagnosis.”
- EDT measures the “first level homeostatic, bioelectrical, influences that control through the automatic nervous system, which is responsible for the equilibrium in the internal systems of the body.”
- Conventional medical tests confirm EDT's ability to diagnose tumors.
- “By measuring electrical resistant over time, EDT devices provide clinicians with a dynamic profile of . . . oscillatory patterns, [holding] great promise for the early diagnosis of significant disease states and for earlier and more effective treatments.”

- EDT research found a “relation to diagnosed heart disease and electrical resistant of tissues connected through a meridian pathway.”
- EDT has “shown that acupuncture point bears a direct relationship on the anatomical structure or physiological function in the body.”
- Studies show that EDT is a “beneficial adjunct” to physicians in prescribing remedies to their patients.

While alleging that purported scientific studies support these extravagant claims, the Asyra manufacturer refuses to provide copies of the alleged studies because doing so would be “far to [sic] time consuming.” AR 1618.<sup>1</sup>

### **C. Procedural History**

This case started in June 2003 when the Department received a complaint from an Oklahoma physician, George M. Cuka, M.D., alleging that Ms. Tasker was practicing medicine without a license based on information on her website indicating that she was offering EDT. AR 1529. Dr. Cuka found particularly “offensive and dangerous” that Ms. Tasker purported to treat both humans and animals by the same type

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<sup>1</sup> This case involves whether Ms. Tasker may offer EDT without a license to practice medicine and veterinary medicine; it does not involve whether EDT is a valid form of treatment. However, it should be noted that EDT is thoroughly discredited. In 2004, the state Medical Quality Assurance Commission suspended the license of a physician for using EDT since the testing was “inefficacious.” AR 1654-72. In U.S. v. Century Clinic, 75 F. Supp. 2d 1127 (D. Nev. 1988), the court enjoined a physician from using an FDA-approved device for EDT since the device was not approved for EDT. Numerous regulatory actions have been taken against EDT practitioners. AR 1573-75. Given this history, Ms. Tasker admitted in a deposition that it would “asinine” for her to try to defend the merits of EDT. AR 1607.

of testing. Department Investigator, Nick Lorentz, filed an Investigation Report after reviewing the website and contacting Ms. Tasker at her home in Colville. AR 1530-1537. Based on the investigation, the Department in March 2005 filed against Ms. Tasker a Notice of Intent to Issue a Cease and Desist Order (NOI), alleging that she was engaged in the unlicensed practice of medicine and veterinary medicine. AR 1543-48.

Ms. Tasker requested an adjudicative proceeding under RCW 34.05 to contest the NOI. On January 25, 2006, on summary judgment, a Department Presiding Officer concluded that Ms. Tasker's use of EDT constituted the unlicensed practice of medicine and veterinary medicine. He entered an "Order To Cease and Desist and Order To Pay Fine." Attachment 1 at AR 2004-2027. In setting the amount of the fine (which under RCW 18.130.190(3) may be up to \$1,000 per day of unlicensed practice), the Presiding Officer found that Ms. Tasker's violations were "egregious" based on numerous factors. Attachment 1 at AR 2024. He imposed a \$10,000 total fine, with \$6,000 suspended on condition that Ms. Tasker timely pay the fine and refrain from future violations of the unlicensed-practice law. Attachment 1 at AR 2027.

Ms. Tasker filed a Petition For Judicial Review of the Presiding Officer's order. CP 3-100. The trial court denied the petition, and affirmed the Department's Cease and Desist Order. CP 507-08. Ms. Tasker appealed to the Court of Appeals. The court commissioner denied

Ms. Tasker's motion for a stay pending appeal, finding that she was "not likely" to prevail on the merits.

## **II. STANDARD OF REVIEW**

In a Petition for Judicial Review, factual determinations must be upheld if they are supported by "substantial evidence." RCW 34.05.570(3)(a). Substantial evidence is "evidence that would persuade a rational, fair-minded person of the truth of the finding." In re Estate of Jones, 152 Wn.2d 1, 8, 100 P.3d 805 (2004). In this case, Ms. Tasker does not challenge any of the Presiding Officer's factual determinations, as all the facts come from Ms. Tasker's deposition, material on her website, and statements from her own customers.

Based on these facts, the Presiding Officer concluded that, in conducting EDT and prescribing remedies, as a matter of law, Ms. Tasker had engaged in the practice of medicine and veterinary medicine without having the legally-required licenses in violation of RCW 18.130.190. This legal conclusion, involving interpretation of RCW 18.130.190, is challenged by Ms. Tasker.

Upon judicial review, an agency's interpretation of the statute it enforces is entitled to "great weight." Port of Seattle v. Department of Ecology, 151 Wn.2d 568, 587, 90 P. 3d 659 (2004); Tapper v. Employment Security Department, 66 Wn. App. 448, 450, 832 P.2d 136 (1992). Thus, in this case, the Presiding Officer's conclusion that Ms. Tasker's EDT constituted the unlicensed practice of medicine and

veterinary medicine, subjecting her to a cease and desist order and a fine under RCW 18.130.190, is entitled to great weight.

### **III. ISSUE**

The issue is whether, in performing EDT and prescribing remedies, Ms. Tasker engaged in the unlicensed practice of medicine and veterinary medicine, making her subject to a Cease and Desist Order and fine imposed by the Department of Health under RCW 18.130.190.

### **IV. ARGUMENT**

#### **A. A Person May Not Practice Medicine or Veterinary Medicine Without a License To Do So.**

Under RCW 18.71.021, a person without a license may not “practice medicine,” as that term is defined in RCW 18.71.011. Under RCW 18.92.070, a person without a license may not “practice veterinary medicine,” as that term is defined in RCW 18.92.010. Ms. Tasker acknowledges that she has no license to practice either profession. AR 1582. The Department may issue a Cease and Desist Order against anyone engaged in unlicensed practice RCW 18.130.190.

#### **B. Ms. Tasker has Engaged in the Practice of Medicine.**

Under RCW 18.71.011, the “practice of medicine” (for which a license is required) occurs whenever a person:

- (1) Offers or undertakes to diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain, or other condition, physical or mental, real or imaginary, by any means or instrumentality;

(2) Administers or prescribes drugs or medicinal preparations to be used by any other person;

As concluded by the Presiding Officer, Ms. Tasker clearly is engaged in activity encompassed by the broad language in both subsections (1) and (2) and therefore is “practicing medicine” in violation of the law. Attachment 1 at AR 2022. As explained below, this conclusion is correct.

**1. Ms. Tasker’s Website Shows That She is “Offering” to Practice Medicine.**

RCW 18.71.011 defines the practice of medicine to occur whenever a person “offers” to engage in the described activity. An “offer” may occur even if a person does not actually engage in the offered activity.

Ms. Tasker maintained an elaborate website advertising her EDT activity. The Presiding Officer found that material on the website shows that Ms. Tasker is offering to practice medicine. Attachment 1 at AR 2009. The Presiding Office noted that the website explains in very authoritative and medical-sounding terms how EDT works:

CEDS is an electrodermal testing device which works by measuring electrical resistance and polarization at meridians.

When a cell is injured by infection, toxins, trauma, etc., swelling occurs. This swelling causes a resistance to the flow of electrons across the cell membrane into the cytoplasm of the cell. This can be measured by an ohm meter when the resistance reading is higher than a cell in a

healthy state, it is an indication of inflammation. As cells begin to die, scar tissue, the resistance (impedance) begins to drop until it reaches zero . . . AR 1684.

The meridian energy flow carries with it information about internal organs that can be used in diagnosis. This is the basis is Computerized Electrodermal Screening (CEDs). The device is used in the CEDs is an electrodermal screen device, which works by measuring the electrical resistance and polarization at acupuncture points and meridians. Through these safe, skin-level measurements, it is possible to analyze the bio-energy and bio-information produced by internal organs and systems.

CEDs is one of the most thorough, powerful, and promising modern, holistic medical/diagnostic methodologies. CEDs addresses the body holistically for a number of reasons: A standard CEDs examination enables the operator to quickly and safely collect information on 40 different individual systems. In other words, all of the body's individual parts are covered in an examination. The bio-information signal read by CEDs is a very direct and true description of the condition of the body because it is created by the body.

The meridian network regulates or at least participates in every kind of bodily function, so naturally it is a very good means by which to monitor the function of the whole body. Product testing allows the operator to test any and every type of medication on the individual patient, including those made from herbs, metals, nosodes, or sarcodes. This allows the operator to explore all available treatment. AR 1683

Computerized Electrodermal Screening identified pathogens, toxins, organ, and emotional dysfunctions even before the symptoms manifest. It determines the correct dosage for maximum effect, using dilutions of energy from over 60,000 homeopathic, herbal, diakra, allopathics, & more. CEDs is non-evasive, inexpensive, effective. It is



an indispensable tool with which to maintain or achieve health or wellbeing. AR 1682.

Our CEDS balancing system is done with the state-of-the-art Orion System. Dog Patch tests and balances more pets with this spectacular technology than any other system in the world. AR 1713.

Of course, unlicensed persons legally may talk or write about whatever medical theory they want. The Presiding Officer correctly found (Attachment 1 at AR 2009-10) that the unlawful “offer” to practice medicine occurs when Ms. Tasker on her website solicits customers to either come to her in person or to mail her samples of their blood or saliva for EDT testing. AR 1714-15. The cost for human testing is \$150. AR 1713.

As found by the Presiding Officer (Attachment 1 at 2009), the fact that Ms. Tasker offers to “practice medicine” is further underscored by the fact that her website includes a health history form that customers fill out prior to testing. AR 1716.

In addition to the website material, the Presiding Officer noted that, in her deposition, Ms. Tasker further explained how she diagnoses through EDT. Attachment 1 at AR 2010. She tests for “electromagnetic energies” that are not tested by physicians. AR 1604. According to Ms. Tasker, the test identifies “electromagnetic signature, the immaterial electromagnetic signature of all kinds in their bodies, whether it’s Parkinson’s or something else.” AR 1605. She thinks that these electromagnetic signatures “pile up in the body” like “worms in a

computer.” AR 1605. She conceded that “it’s a very complicated process (that) even the most brilliant physicists do not yet understand.” AR 1605.

She further explained:

You know my testing is for electromagnetic signatures. And so if I see the electromagnetic signatures of, let’s say a pituitary tumor, then if a person’s question is ‘could that be physical,’ then I would have to tell them what some of the physical indications would be, but it isn’t telling them that they have the physical problems. It’s just indicating to a person that these are the physical things that they would notice if it was – if it was a physical thing. But I don’t know, because I test for electromagnetic signatures. AR 1607.

So if a person comes in and they have an electromagnetic signature, and the [EDT] computer says it’s the electromagnetic signature as whatever it may be, say porphyria or whatever, then there is an electromagnetic signature match. AR 1604.

A critical component of the business is that Ms. Tasker uses the EDT results to prescribe various remedies or “tinctures” to improve the client’s health. In her deposition, as noted by the Presiding Officer (Attachment 1 at AR 2011-12), Ms. Tasker attempted to explain the process of identifying the correct tincture (or remedy) for the particular customer:

Q: Can you describe what a tincture is?

A: The tincture is water and alcohol, or it is a commercial homeopathic preparation, and the recording of the electromagnetic field is imprinted into that tincture.

Q: The record being?

A: The electromagnetic fields that are detected in the client and stored in the computer and then essentially downloaded into a tincture. And the animal is either given that tincture, or the person, if it happens to be a person, takes their own electromagnetic fields by taking it imprinted into the tincture.

Q: Okay. And what is the form that the downloaded energy takes? I mean, how is it imprinted? How does that work as a matter of mechanics or physics?

A: It is all – it's all – let me see what would be the right word. All of the signatures are stored, just like all the information in a computer, in zeros and ones. And each electromagnetic signature has its own pattern of zeros and ones, and that's how it's stored onto the computer. And the computer just imprints the frequencies or the force fields of those patterns that are – then come from the client, imprints it into the tincture.

Q: And how do you do that?

A: I put the – if I'm using a commercial homeopathic, then I put that homeopathic on the DCM.

Q: What is that DCM?

A: The digital conductance meter. And it would then – the digital conductance meter then detects the electromagnetic fields in the tincture, the prepared homeopathic tincture, the over-the-counter kind you buy at the store. It would detect those electromagnetic field, and the computer would compare those electromagnetic fields to the electromagnetic fields from the client that the stored in the computer. And the closer the match, then that

tells me that a tincture, if it's a close match, that a tincture is similar to the electromagnetic fields in the client. AR 1588.

In her deposition, Ms. Tasker claimed that she "gives away" the homeopathic remedies. AR 1588. However, as noted by the Presiding Officer (Attachment 1 at AR 2012), her listing of remedies includes prices. AR 1587-88.

Additionally, as found by the Presiding Officer (Attachment 1 at AR 2013-14), Ms. Tasker's website contains numerous testimonials from her satisfied customers. AR 1989-93. The most elaborate testimonial came from "J.M." in the form of a letter to her doctor. AR 1686-89. J.M. states that she underwent 7-8 hours of EDT testing by Ms. Tasker, and learned the following:

That I had the energy signatures of Alzheimer's, Epstein Barr virus, Chronic Fatigue syndrome, and amazingly: my brain was burdened by energy signatures of heavy metals, aspartame, formaldehyde, and many other chemicals, including those used in bio-warfare, and Joyce believed, many used in prescription drugs (like HRT, etc.).

According to the information in J.M.'s letter to her doctor, Ms. Tasker advised J.M. to discontinue three of her five doctor prescriptions, and instead take eight different homeopathic remedies. Subsequently, Ms. Tasker diagnosed J.M. with a benign tumor and Parkinson's. According to J.M., her homeopathic remedies help her "with these newly diagnosed problems." J.M. told her physician that she did not want to take her prescriptions because of her Alzheimer's diagnosis and because they were "poisoning" her.

Another website testimonial stated that S.M. had a thyroid condition and stomach pains, and after EDT experienced immediate relief of “long-term severe cramping.”

For the first time in 30 years, after undergoing EDT, R.G.’s psoriasis does not “break out” when he goes off his medication.

J.T. was cured of porphyria, chemical sensitivity, and kidney/gall bladder cancer.

K.V. suffered from diabetes and a stroke. His physician gave him only nine months to live, but Ms. Tasker “proved them wrong.” Her EDT treatment allowed K.V. to gain improved circulation, increased mobility and weight loss, and to discontinue most of his medications.

J.R. claims that his physician confirmed the results of Ms. Tasker’s “liver lab workup.” His dramatically-improved blood-test results are posted on the website.

J.W. experienced better “oxygen levels.”

After treating her cat, N.B.D. states that Ms. Tasker treated him for a “really bad” lymph system and thyroid.

L.M. claims that Ms. Tasker’s “Orion balancing” improved his “thinking” and made it easier to walk when he woke in the morning.

Ms. Tasker identified L.M.’s “pituitary tumor” and then he stopped urinating too frequently because of the “balancing.” The treatment also cured L.M.’s multiple chemical sensitivity and his pain “in the area of the gallbladder.”

Ms. Tasker treated D.B., a seriously-ill cancer patient.

She treated S.N., who is bi-polar and apparently was suicidal after having her upper teeth extracted.

She treated S.G. for a virus on the optic nerve. AR 1989-93.

The Presiding Officer found that Ms. Tasker posts these testimonials in an attempt to attract new customers by presenting herself as a healer. Attachment 1 at AR 2014. Based on the foregoing information, there is no doubt that Ms. Tasker “offered” to “practice medicine” as that term is defined in RCW 18.71.011(1):

Offers . . . to diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain, or other condition, physical or mental, real or imaginary, by any means, or instrumentality.

## **2. Ms. Tasker is Actually Practicing Medicine.**

The RCW 18.71.011 definition relates to an “offering” or “undertaking” to practice medicine. The discussion above relates to what Ms. Tasker “offers”. These offers by themselves constitute the practice of medicine. The evidence further shows that she also has “undertaken” to practice medicine in the sense of actually conducting the activity. Of course, this fact is clearly shown by the above-discussed testimonials from some of Ms. Tasker’s customers posted on her website.

Evidence discussed below, while not specifically cited by the Presiding Officer in his decision, further supports the fact that Ms. Tasker was actually practicing medicine.

To discover additional information about her customers, and the extent of her business, the Department conducted discovery to obtain her EDT records. AR 1732-39. Ms. Tasker responded that she did not keep the names of clients or client records. AR 1731. When pressed, Ms. Tasker produced a single sheet of paper with the names and e-mail addresses for seven alleged clients. AR 1742. In her deposition, Ms. Tasker insisted that she would not divulge the names of customers whose body fluids she allegedly tested in her car on an Indian reservation on the (mistaken) assumption that doing so allowed her to engage in unlicensed practice free from the prohibition of state law. AR 1597.

The Presiding Officer ordered Ms. Tasker to produce (1) client computerized records on all customers and (2) financial records of customer check deposits. CP 968-970. Ms. Tasker simply ignored the order and never produced the material. Thus, it is totally unknown how many customers received EDT from Ms. Tasker.

In any event, the Program attempted to contact the seven alleged customers identified by e-mail, and was able to establish contact with only two of them. Both were interviewed by the Department, but were not available to sign a declaration. However, the Department submitted a declaration from a third party about the two interviews. AR 1744-51.

Customer "A" had multiple health problems when she contacted Ms. Tasker for help. These problems included Alzheimer's, fibromyalgia, chronic fatigue, Sjorgrens, autoimmune problems, "head tumors which showed a network of dead brain cells", and she was forgetful. She felt she

had “nothing to lose” by seeking treatment from Ms. Tasker. Her treatment was in-person, and she describes how the “computer automatically imprints energy into the tinctures.” She credits the “energy infusion that... goes into the tincture” for her improved health. She states that Ms. Tasker told her that her improved energy was consistent with her EDT that showed “significantly fewer meridians in distress.”

Customer “B” states that she learned about Ms. Tasker’s services through a flyer, showing that Ms. Tasker advertises her services in more ways than just on her website. She states that she sought help for “sciatic pain.” She sent blood and saliva to Ms. Tasker for testing about four times, and also has seen her in person. According to “B”, Ms. Tasker has provided “homeopathic tinctures infused with my own energies.” She was charged \$150 for the “infusion.” She states that she “continues to have a lot of sciatic discomfort” despite Ms. Tasker’s treatment.

Based on the foregoing, as found by the Presiding Officer, there is no doubt that Ms. Tasker has actually “undertaken” to practice medicine, as that term is defined by RCW 18.71.011:

- (1) . . . undertakes to diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain, or other condition, physical or mental, real or imaginary, by any means or instrumentality;
- (2) Administers or prescribes drugs or medicinal preparations to be used by any other person.



**3. Expert Opinion Supports The Finding That Ms. Tasker Is Practicing Medicine.**

Harriet Hall, M.D., stated her professional opinion that Ms. Tasker has engaged in the practice of medicine. AR 1754-59. Dr. Hall bases her opinion on the fact that Ms. Tasker: (1) solicits customers with health problems and offers treatment; (2) interprets test results and identifies illnesses through a so-called “electronic signature”; (3) advises customers to follow her advice and provides them with medicinal preparations; (4) conducts follow-up visits and adjusts medications; (5) claims that her customers receive a health benefit from her services; and (6) holds herself out as an “alternative” health care provider.

Ms. Tasker criticizes Dr. Hall’s expertise and objectivity. Brief at 26-27. The Presiding Officer did not rely on Dr. Hall’s opinion in rendering his decision. However, it should be noted that Dr. Hall is a well-qualified retired physician, AR 1760-61, who since retirement has developed expertise in the scientific basis for alternative health care. AR 1761. Moreover, no physician in this case testified that Ms. Tasker’s activity was not the practice of medicine, and Dr. Hall’s opinion is rooted in common sense.

**4. Other Cases Support the Department’s Position That Ms. Taker’s EDT Activity is the Practice of Medicine.**

The Court of Appeals, Division I, decided a different EDT case, in the Department’s favor.<sup>2</sup> State v. Pacific Health Center, 135 Wn. App.

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<sup>2</sup> This case involved consolidated actions brought by the Attorney General Office (AGO) Consumer Protection Division and the Department of Health. The Department obtained

149, 143 P.3d 618 (2006). See Attachment 2. As described by the court, the unlicensed practitioner, Monte Kline, used his EDT device to measure “electrical resistance” and then used the test results to diagnose conditions and to prescribe remedies to make his customers feel better. Id. at ¶¶ 3-5, 11, 12, 20. The court held the use of EDT at Pacific Health Center was the “practice of medicine.” Id. at ¶¶ 13-24. According to the court, the holding was compelled by the “plain language” of RCW 18.71.011. Id. at ¶ 19. A case cited by the court, People v. Rogers, 249 Mich. App. 77, 641 N.W.2d 595 (2001), upheld a criminal conviction for using an EDT device and selling remedies without the required medical license. Id. at ¶ 18.

**C. Ms. Tasker’s Arguments that She is Not Practicing Medicine are Without Merit.**

- 1. The fact that Ms. Tasker discloses that she is not licensed does not remove her from the prohibition against the unlicensed practice.**

Ms. Tasker argues that she did not violate the unlicensed-practice law because she disclosed on her website that she was not licensed. Brief at 2. The Presiding Officer correctly rejected this argument as follows:

Nothing in either RCW 18.71 (Physicians) or RCW 18.92 (Veterinary Medicine) allows a person to avoid the licensing requirement by making a disclaimer. Otherwise,

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an injunction against Pacific Health Center for unlicensed practice. Id. at ¶ 7. While finding that unlicensed practice had occurred, as alleged by the AGO and the Department, the Court also found that the practice did not constitute a violation of the Consumer Protection Act (CPA). Id. at ¶ 29-36. The rejected CPA claim was brought by the AGO and not by the Department. This case against Ms. Tasker does not involve a CPA claim. The Consumer Protection Division has filed for reconsideration on the CPA issue.

persons could do anything they wanted as long as they said they were not practicing medicine or veterinary medicine. The licensing requirement would be so easy to avoid that it would become meaningless.

Attachment 1 at AR 2021-22. In other words, the unlicensed-practice law does not merely prohibit a person from falsely claiming to be a licensed physician. Rather, it prohibits an unlicensed person from practicing medicine, whether or not they claim to be licensed to do so.

**2. RCW 18.71.011 Does Not Distinguish Between “Alternative” Medicine and “Traditional” Medicine.**

Ms.Tasker argues that the activity described in RCW 18.71.011(1) does not apply to her EDT practice because EDT is “alternative medicine.” Brief at 13-19. The Presiding Officer correctly found that the definition does not differentiate between “alternative” and “traditional” forms of medicine. Instead, the statute covers all activity that fits the description within the broad definition of offering/providing health advice and care. Attachment 1 at AR 2017-18. In Pacific Health Center, the Court took the same position as taken by the Presiding Officer:

PHC’s terminology may differ from that of Western medicine, but ultimately they offer and use EDT to determine, or ‘diagnose’ physical conditions or potential conditions, and then they suggest remedies to address, or ‘treat,’ those conditions. They may diagnose conditions by analyzing energy levels, but they still diagnose conditions. As the Amber court stated, ‘whether actions constitute the practice of medicine is dependent upon the facts, and not

upon the name of the procedure, its origins, or legislative  
lack of clairvoyance . . .<sup>3</sup>

143 P.3d 618, ¶ 20 (Attachment 2). As found by the Presiding Officer, this conclusion is bolstered by RCW 18.71.030, which contains 14 different exemptions from the medical licensing requirement, none of which exempt the practice of alternative or non-traditional medicine. Attachment 1 at 2019.

Moreover, the Presiding Officer's conclusion is further bolstered by RCW 18.71.030(4), stating that one exception to the "practice of medicine" is for persons who engage in activity that is permitted under a license other than a license to practice medicine. RCW 18.71.030(4). For example, a naturopath, who is not a physician, may engage in activity that meets the practice-of-medicine definition, so long as the activity is within the permitted scope of practice for a naturopath in RCW 18.36A. The Presiding Officer correctly concluded that this exception means that Ms. Tasker, who has no license to practice any type of health care, may not engage in any activity that comes within the practice-of-medicine definition in RCW 18.71.011(1). Attachment 1 at AR 2018-19.

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<sup>3</sup> In People v. Amber, 76 Misc.2d 267, 349 N.Y.S. 604 (1973), the court held that acupuncture was the practice of medicine.

**3. Ms. Tasker's Activity is Not Exempt From Licensing Based On Her Assertion That She Is Not Endangering Customers.**

Ms. Tasker argues that she may perform EDT without a license because she alleges that her activity is not endangering anyone. Brief at 2, 7-11, 13, 16-18. As explained below, this argument is without merit.

First, the language of RCW 18.130.190, authorizing the Department to issue cease and desist orders, does not require the Department to prove that the particular form of unlicensed practice somehow endangers the person receiving care. Thus, unlicensed practice is prohibited regardless of the “dangerousness” of the activity.

Moreover, as found by the Presiding Officer, the danger in unlicensed practice is that the practitioner is unqualified to provide care and will cause the sick person not to seek care from qualified licensed providers. Attachment 1 at AR 2020. This concern certainly rings particularly true in Ms. Tasker's case given that she seeks and treats customers who have very serious health problems. Based on the regulatory scheme, the legislative intent, and the facts of this case, Ms. Tasker is *per se* endangering sick customers by “treating” them even though she has no legally-required license.

Finally, in support of her argument, Ms. Tasker cites RCW 18.120.010(2)(a). Brief at 8-10. Because this issue was not raised

before the Presiding Officer, it was not addressed in his decision. The statute is discussed below.

Laws normally establish rights and duties. RCW 18.120 is an unusual law in that it purports to set standards for the legislature to follow in creating new categories of health care professions in the future. Ms. Tasker's notes that RCW 18.120.010(2)(a) states that a "health care profession should be regulated only when unregulated practice can clearly harm or endanger the health, safety, or welfare of the public." She argues that this provision means that the state cannot regulate her EDT activity because, she claims, it does not harm people. Brief 4-5.

Her argument misconstrues the purpose of RCW 18.120. The bill report indicates that the 1983 law is meant to provide guidelines for when the legislature should create new categories of health care professions. CP 636-37. The legislature sought to restrict the future creation of new categories of licenses because proliferation "tended to further fragment the health care delivery system" and "restrict entry into professions." CP 637. Clearly, the legislation was not intended to allow unlicensed persons to "practice medicine" within the meaning of RCW 18.71.011 so long as they did not harm or endanger anyone in the process. In fact, as stated, RCW 18.130.190 (enacted in 1984, after enactment of RCW 18.120)

prohibits unlicensed practice without any requirement that the Department prove that the unlicensed practice is harmful or dangerous.

**4. Ms. Tasker May Not Conduct Her Unlicensed Activity Under the Guise of Conducting Biofeedback.**

One of Ms. Tasker's main – and most disingenuous – arguments is that she permissively uses EDT for “biofeedback.” Brief at 11-13, 19-23. For reasons explained below, the Presiding Officer correctly rejected her biofeedback argument.

In her deposition, Ms. Tasker claimed that she used biofeedback to “relax” the customer. AR 1588. It is true, as explained by Dr. Hall, that some EDT devices are Class II FDA-approved “galvanic skin response” devices for biofeedback use. As further explained by Dr. Hall, biofeedback is a legitimate form of therapy used by some licensed health care professionals. According to Dr. Hall, the device measures a patient's galvanic skin responses, and may assist trained therapists in improving a patients' health by helping them to learn to “modify their physiological process over time.” AR 1578-79.

The first problem with Ms. Tasker's biofeedback argument is that, as noted by the Presiding Officer, no information on Ms. Tasker's website states or even implies that she offers biofeedback services. Attachment 1 at AR 2008. Nor, as further noted by the Presiding Officer, is there any evidence that she performs biofeedback or “relaxation training.” *Id.* Indeed, Dr. Hall stated that biofeedback simply does not even remotely involve identifying “electromagnetic signatures” in order to assess a

person's health and then to prescribe homeopathic medicines. AR 1759. According to the Presiding Officer, what Ms. Tasker does is not biofeedback, and certainly is not FDA-approved. Attachment 1 at AR 2020.

Simply because a device is approved for biofeedback does not mean that the device may be legally used for any purpose. U.S. v. Century Clinic, 75 F. Supp. 2d 1127 (D. Nev. 1998), involved a consent decree in which a licensed physician had been enjoined from using a galvanic skin response device for EDT because the device is not approved by the FDA for EDT.

In support of her argument, Ms. Tasker cites Wutzke v. Schwaegler, 86 Wn. App. 898, 905, 940 P.2d 1386 (1997), which notes that state statutes cannot "impose conditions" on federally-approved medical devices. Brief at 14-15. Because Ms. Tasker did not cite Wutzke in the administrative proceeding, the Presiding Officer's decision did not address this case.

Wutzke involved an issue not presented in Ms. Tasker's case: namely, whether federal law preempts state law tort actions with respect to federally-approved medical devices. Nothing in the court's holding, or in federal law, prevents a state from enforcing its unlicensed-practice law, thereby restricting who may use a medical device. Moreover, Wutzke does not support Ms. Tasker's absurd argument that once a medical device is federally-approved for one specific purpose (biofeedback) it may be used by any person (licensed or not) for any purpose.



Finally, Ms. Tasker also cites WAC 296-21-280 to support her biofeedback argument. Brief at 13. Again, because Ms. Tasker did not cite WAC 296-21-280 in the administrative proceeding, the Presiding Officer did not address the rule in his decision.

WAC 296-21-280 rule states that, under certain conditions, the Department of Labor & Industries (L&I) will pay for biofeedback treatment. However, the rule requires that the treatment be provided by “medical doctors, osteopathic physicians, licensed psychologist, and other qualified providers” who are “certified by the Biofeedback Certification Institute of America (BCIA).” Clearly, even if she did offer biofeedback, Ms. Tasker would not qualify to receive L&I payment, as she is neither licensed, nor BCIA-certified. In any event, the L&I rule certainly does not support her contention that an unlicensed person, like herself, may provide EDT or biofeedback treatment without having to obtain an appropriate healthcare license.

**D. Ms. Tasker is Engaged in the Unlicensed Practice of Veterinary Medicine.**

The Presiding Officer also correctly held that Ms. Tasker had engaged in the unlicensed “practice of veterinary medicine” based on her use of EDT on animals. Attachment 1 at AR 2023.

**1. Ms. Tasker’s Activity Falls Within the Practice of Veterinary Medicine as Defined by RCW 18.92.010(1).**

RCW 18.92.010(1) states that the practice occurs whenever a person:

By . . . statement . . . represents his or her ability or willingness to diagnose or prognose or treat diseases, deformities, wounds, or injuries of animals.

This statute relates to “statements” or offers to treat animals. On her website, as discussed above, Ms. Tasker offers EDT services. According to the website, Ms. Tasker’s services are available for animals, as well as for humans. Ms. Tasker makes no attempt to differentiate the treatment, except that she charges less for animal testing (\$115) than for human testing (\$150). AR 1713.

As with humans, the Presiding Officer found (Attachment 1 at AR 2014) that Ms. Tasker posts testimonials on her website related to her treatment of pictured dogs and cats in order to entice new customers, AR 1696-1706. These testimonials included:

“Severe candida problem brought on by Thimersal (Vaccine Additive) (Tasha);

Growing hair on bald spots (Tasha)

Regain “motor function” after a “major bi-lateral stroke” (Buddy);

Disappearance of a “lump in the groin area” (Finnigan);

Improved mobility (Finnigan);

Weaned off codeine (Finnigan);

Binge eating (Mia);

Hyperactivity (Mia);

Improved liver enzymes (Shasta);

Improved disposition (Katie);

Restored health (Ella);  
Migraines (Gabe);  
Back pain (Gabe);  
Emotional Problems (Gabe);  
Restored energy (Kaiya);  
Weight gain (Emerald); and  
Kidney failure (Emerald).

As found by the Presiding Officer, based on the information on her website, it is clear that Ms. Tasker made “statements” of her “ability and willingness to diagnose or treat animal diseases.” Thus, the Presiding Officer correctly found that her activity constitutes the “practice of veterinary medicine” as defined by RCW 18.92.010(1). Attachment 1 at 2023.

**2. Ms. Tasker’s Activity also Falls Within the Practice of Veterinary Medicine as Defined by RCW 18.92.010(3)-(4).**

RCW 18.92.010 states that the “practice of veterinary medicine” also means to:

(3) . . . diagnose or prognose animal diseases, deformities, defects, wounds, or injuries, for hire . . .

(4) . . . prescribe or administer any drug, medicine, treatment, method or practice, or apply any apparatus or appliance for the cure, amelioration, correction, or modification of any animal disease, deformity, defect, wound or injury, for hire . . .

The question is whether Ms. Tasker is actually conducting a service described in subsections (3) and (4). As found by the Presiding Officer (Attachment 1 at 2014), Ms. Tasker admits to having tested up to 50 pets. AR 1584. Additionally, the testimonials above show that Ms. Tasker has treated animals for a variety of health issues. As found by the Presiding Officer (Attachment 1 at 2015), Ms. Tasker explains that animal testing is performed by placing the probe in the hand of the owner, who acts as a “surrogate for delivering the animal’s electromagnetic fields into the computer.” AR 1585.

The other question related to the applicability of subsections (3) and (4) is whether Ms. Tasker charges for her services, as the services must be “for hire.” The Presiding Officer correctly found that Ms. Tasker’s services were “for hire” because she advertises her animal testing for \$115. Attachment 1 at 2014.

**3. Expert Opinion Supports the Program’s Allegation that Ms. Tasker has Engaged in the Practice of Veterinary Medicine.**

Ms. Tasker disputes the qualifications of Dr. Linda Crider, DVM, who submitted a declaration in the administrative proceeding. Brief at 27. The Presiding Officer did not rely on Dr. Crider’s declaration in his decision. However, it should be noted that Dr. Crider is a licensed veterinarian, and offered her expert opinion that Ms. Tasker has engaged in the practice of veterinary medicine. AR 1767-70. Dr. Crider stressed that Ms. Tasker purports to treat conditions that commonly are treated by

veterinarians, and does so through a method (EDT) that has no proven validity, thereby jeopardizing the health of animals she treats. No veterinarian testified for Ms. Tasker.

**E. Ms. Tasker’s Constitutional Claims Should be Rejected.**

**1. The Definition of the “Practice of Medicine” is Not Unconstitutionally Vague.**

Ms. Tasker argues that the definition of the “practice of medicine” in RCW 18.71.011 is “unconstitutionally vague.” Brief at 17. In non-First Amendment cases, like Ms. Tasker’s, vagueness challenges will be “evaluated in light of the particular facts of the case – as applied – requiring inspection of the actual conduct of the party challenging the statute.” State v. Sullivan, 143 Wn.2d 162, 183, 19 P.3d 1012 (2001). In Pacific Health Center, the court in effect adopted an “as applied” evaluation in rejecting the vagueness argument:

We acknowledge appellants’ concern that the statute’s plain language could allow the State to regulate many practices that the legislature could not have intended, such as elementary teachers instructing students on health and hygiene or a Pilates instructor advising a client to hold in her stomach to avoid lower back pain. But those situations are not before us. Using EDT as an instrument to determine or ‘diagnose’ medical conditions in a patient and then recommending and selling specific remedies, are practices that unquestionably fall within the valid police power the legislature exercised when it regulated the practice of medicine.

143 P.3d 618 ¶ 21 (Attachment 2). Courts in other jurisdictions have found broadly-defined “practice of medicine” is not unconstitutionally

“overbroad” when the unlicensed practitioner engaged in activity that clearly fell within what the legislature intended to prohibit. People v. Rogers, 249 Mich. App. 77, 90, 641 N.W.2d 595 (2001); State v. Hoffman, 733 P.2d 502, 505-06 (Utah 1987).

In this case, in conjunction with taking a customer’s health history, Ms. Tasker claimed through EDT that she could test for “electrical signatures” in the body, and then somehow interpret the test results in order to identify appropriate remedies to help the customer overcome specific diseases. As found by the court in Pacific Health Center, this type of EDT activity clearly comes within the “practice of medicine,” as defined in RCW 18.71.011, for which a medical license is required. Ms. Tasker’s vagueness argument, therefore, is without merit.

**2. This case does not involve the free speech protected by the First Amendment.**

Ms. Tasker argues that the Department’s Cease and Desist Order violates her First Amendment right of free speech on her internet website. Brief at 25-26. This argument is without merit.

In support of her argument, Ms. Tasker cites Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8<sup>th</sup> Cir.1998). In that case, the court rejected an Indian tribe’s claim that a brewing company’s internet advertising conferred jurisdiction on the tribal court to decide the tribe’s challenge to the company’s right to use the name “Crazy Horse Malt Liquor” for one of its products. Id. 1093. The court’s decision

involved tribal jurisdiction and not free speech. It has no relation to Ms. Tasker's free speech claim.

Regarding the First Amendment, statutes "which regulate behavior, as opposed to speech, will not be overturned unless the overbreadth is real and substantial in relation to the conduct legitimately regulated by the statutes." State v. Riles, 135 Wn.2d 326, 346, 957 P.2d 655 (1998). In regulating the unlicensed practice of health care, the Department is regulating conduct – not speech. Indeed, on the internet or elsewhere, Ms. Tasker may make any claim she wants about the effectiveness of EDT in diagnosing or treating disease; the unlicensed-practice law does not regulate mere expression of opinion, however misguided the opinion. What Ms. Tasker may not do, however, is actually offer or undertake to treat people using EDT. At that point, she "crosses the line" into conduct that constitutes unlicensed practice. In sum, in regulating unlicensed practice, the law regulates conduct and not speech, meaning the law does not violate First Amendment rights. As the court held in People v. Jeffers, 690 P.2d 194, 197 (Colo. 1984):

The statute under attack... deals exclusively with harmful, constitutionally unprotected conduct, and has no discernable effect on speech or expression. Pursuant to its police power, Colorado may define and regulate the practice of medicine and may prohibit unlicensed individuals from providing medical treatment. The practice of medicine itself is not protected by the first amendment. Therefore, reasonable regulation of medical practice does not conflict with first amendment protections.

**F. The Presiding Officer had Authority to Enjoin Ms. Tasker from Conducting EDT on Indian Land.**

The Presiding Officer ruled that the Cease and Desist Order applied to activity by Ms. Tasker anywhere in the state, including on Indian land. Attachment 1 at 2025. She contests this. Brief at 23-25. The “Indian” issue arose during the adjudicative proceeding when Ms. Tasker claimed she had escaped the Department’s jurisdiction by starting to conduct her blood/saliva EDT tests from inside her car on an Indian reservation. She did not support this bizarre claim through a declaration. Nor did she explain how she could operate the electrical EDT device from her car. AR 1019.

The Presiding Officer made a correct pre-hearing ruling that the Department had jurisdiction over Ms. Tasker even if she planned to test on Indian land. AR 1291-92. Ms. Tasker does not claim to be an Indian, and does not claim to be treating Indians. RCW 37.12.010 grants the state “civil jurisdiction” over Indian lands, except when Indians are involved (and even Indians are subject to state jurisdiction in certain specified fields of the law). In other words, non-Indians, like Ms. Tasker, are subject to state law when they are on Indian land. Citing this statute, the state Supreme Court has held that the state may “impose its laws on reservation conduct involving only non-Indians.” Powell v. Farris, 94 Wn.2d 782, 785, 620 P.2d 525 (1980). The U.S. Supreme Court has also upheld the right of the state to regulate non-Indians on Indian land. Yakima County



v. Yakima Indian Nation, 502 U.S. 251, 257-58, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992).

Accordingly, Ms. Tasker cannot evade state law by simply transferring her illegal activity onto Indian land; that is, Indian land is not a “safe haven” for non-Indians wishing to evade the requirements of state law. Thus, the Presiding Officer was correct in extending onto Indian land the prohibition against unlicensed practice by Ms. Tasker.

**G. The Rule of Lenity Does Not Apply to Ms. Tasker’s Case.**

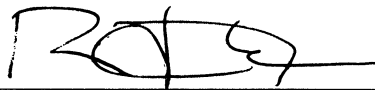
Ms. Tasker argues that the “law of lenity” should be applied to reverse the Department’s order and to allow her to perform EDT and prescribe remedies without being a licensed physician or veterinarian. Brief at 19-20. The rule of lenity requires a court to interpret an ambiguous statute in favor of a criminal defendant absent legislative intent to the contrary. State v. Jacobs, 154 Wn.2d 596, ¶ 7, 226 P.3d 281 (2005). The rule does not apply here because Ms. Tasker’s case is not criminal, and because there is nothing “ambiguous” about the statutory prohibition against the unlicensed practice of medicine and veterinary medicine when applied to Ms. Tasker’s activity.

**V. CONCLUSION**

Based on the foregoing, the Department of Health respectfully requests the Court to affirm the Presiding Officer’s decision issuing a Cease and Desist Order and imposing a fine against Joyce Tasker for the unlicensed practice of medicine and veterinary medicine.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of December,  
2006.

ROB MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read 'R. McCartan', written over a horizontal line.

Richard A. McCartan, WSBA # 8323  
Assistant Attorney General  
Attorneys for Department of Health

# **ATTACHMENT 1**

**STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
ADJUDICATIVE SERVICE UNIT**

In the Matter of the Unlicensed	)	
Practice of Medicine and Veterinary	)	Docket No. 04-06-B-1079UR
Medicine of:	)	
	)	
JOYCE M. TASKER,	)	ORDER ON MOTIONS FOR
	)	SUMMARY JUDGMENT,
Respondent.	)	ORDER TO CEASE AND DESIST,
	)	AND ORDER TO PAY FINE
	)	

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**APPEARANCES:**

Respondent, Joyce M. Tasker, pro se

Department of Health Unlicensed Practice Program (the Program), by  
The Office of the Attorney General, per  
Richard McCartan, Assistant Attorney General

**PRESIDING OFFICER:** Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on cross motions for summary judgment filed by the parties.

**I. PROCEDURAL FINDINGS AND MOTION FOR SUMMARY JUDGMENT**

1.1 On November 7, 2005, the Respondent filed a Motion for Summary Judgment. The exhibits, which were not numbered or paginated, were filed November 10, 2005.

1.2 On November 21, 2005, the Presiding Officer issued an Order on Briefing Schedule for Motions for Summary Judgment and Order Rescheduling Prehearing Conference. The Presiding Officer scheduled completion dates for filing of summary judgment motions, legal memorandums and exhibits. *Prehearing Order No. 16.*

ORDER ON MOTIONS FOR SUMMARY  
JUDGMENT, ORDER TO CEASE AND  
DESIST, AND ORDER TO PAY FINE

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1.3 On November 28, 2005, the Respondent filed a Motion for Summary Judgment REVISED. The Respondent attached documents, which were not numbered or paginated.

1.4 On December 1, 2005, the Respondent filed a Supplemental Motion to Summary Judgment REVISED. The Respondent attached documents, which were not numbered or paginated.

1.5 On December 7, 2005, the Presiding Officer issued an Order Granting Extension to File Summary Judgment Motion. The Presiding Officer granted the Program an additional week to file its motion and provided additional time for the Respondent to file responding memorandums. *Prehearing Order No. 18.*

1.6 On December 12, 2005, the Department filed a Motion for Summary Judgment and Supporting Memorandum. The Department attached exhibits numbered 1-20, which were filed on November 13, 2005. [Hereinafter referred to as Program's Exhibits Nos. 1-20.]

1.7 On December 16, 2005, the Program filed a Reply to Respondent's Motion for Summary Judgment.

1.8 On December 21, 2005, the Respondent filed a Reply to Program's Response to Respondent's Summary Judgment and Summary Judgment Revised.

1.9 On December 21, 2005, the Respondent filed a Response to Program's Motion for Summary Judgment.

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ORDER ON MOTIONS FOR SUMMARY  
JUDGMENT, ORDER TO CEASE AND  
DESIST, AND ORDER TO PAY FINE

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1.10 On December 29, 2005, the Respondent filed a Response to Program's Motion for Summary Judgment Revised. The Respondent attached exhibits numbered 1-10. [Hereinafter referred to as Respondent's Exhibits Nos. 1-10.]

1.11 On December 29, 2005, the Respondent filed a Reply to Program's Response to Respondent's Summary Judgment and Summary Judgment Revised.

## **II. MOTIONS FOR SUMMARY JUDGMENT AND ARGUMENT OF THE PARTIES**

2.1 The Program requests that the Presiding Officer determines as a matter of law that the Respondent has engaged in unlicensed practice of medicine and veterinary medicine. The Program requests that the Presiding Officer issue a cease and desist order and requires that the Respondent pay a fine. The Program maintained that there are no material facts in dispute, because the Program's motion for summary judgment relies on the most part from the Respondent's website and statements by her from her deposition.

2.2 In opposition to the Program's motion, the Respondent moves for summary judgment in her favor and seeks dismissal of the Program's action against her. The Respondent argued that the applicable statutes are ambiguous and that the legislature intended to allow alternative non-traditional medical modalities outside of medicine as practiced by physicians. The Respondent also argued that the Uniform Disciplinary Act, chapter 18.130 RCW, only applies to the professions listed in the Act and that she does not need a license. The Respondent further argued that the electrodermal testing (EDT), which she performs, is safe, because the instrument that

she uses, a biofeedback machine, has been approved by the Federal Food and Drug Administration. Finally, the Respondent argued that the Program's policy violates the due process clause of the Fourteenth Amendment because it unduly burdens the Respondent's fundamental right and is not justified by any compelling state interest under the UDA.

### III. FINDINGS OF FACT

3.1 Joyce Tasker, the Respondent, resides in Colville, Washington. She has never held a credential to practice as a health care professional in the state of Washington. On September 25, 2001, the American Institute of Energy Medicine issued to the Respondent a certificate stating that she has a professional title of "Technician of BioEnergetic Medicine and Computerized Electro Dermal Screen." *Respondent's Exhibit No. 2.*

3.2 The Respondent has two businesses called "Energieswork" to treat persons and "Dog Patch" to treat animals. There is a website for each business. The primary service for this business is electrodermal testing (EDT). In performing this testing, the Respondent employs two devices, which do the same, the Orion and a more recent model, the Asyra. The Respondent bought her first EDT device (Orion) three years ago, and then upgraded to a newer machine (Asyra) that she now uses in her practice. The Respondent has been offering this testing since 2003 when the Department received a complaint against her. In her business, the EDT testing is also described as an Orion session. The EDT devise can also be called a Digital Conductance Meter (DCM).

3.3 EDT devices typically operate as follows:

The device emits a tiny direct electric current . . . that flows through a wire from the device to a brass cylinder covered by moist gauze, which the patient holds in one hand. A second wire is connected from the device to a probe, which the operator touches to "acupuncture points" on the patient's other hand or a foot. This completes a low-voltage circuit and the device registers the flow of current.

The information is then relayed to a gauge or computer screen that provides numerical readout on a scale of 0 to 100. According to Voll's theory: readings from 45 to 55 are normal ("balanced"); readings above 55 indicate inflammation of the organ "associated" with the "meridian" being tested; and readings below 45 suggest "organ stagnation and degeneration." The size of the number actually depends on how hard the probe is pressed against the patient's skin.

*Program's Exhibit No. 4, p. 2.*

3.4 The Federal Food and Drug Administration (the FDA) determined that the Orion, a Digital Conductance Meter, was substantially equivalent to devices marketed prior to May 1976 when the Medical Device Amendment was enacted. The Orion was described to the FDA as a biofeedback device. The FDA noted that the Digital Conductance Meter was used for relaxation training only. Even though the Orion device was found to be substantially equivalent and can be marketed, it cannot be promoted in any way to state that the device was approved by the FDA. *Respondent's Exhibit No. 1, Letter to James Clark from Thomas Callahan, March 14, 1996.* There is no information on the Respondent's website that the Respondent was offering biofeedback services.

3.5 When the EDT device (DCM) is connected to a computer with the appropriate software, the computer monitor provides a numerical readout of the electrical current. The Respondent described this testing as Computerized

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Electrodermal Screening (CEDS). On her website, the Respondent makes the following claim:

The meridian energy flow carries with it information about internal organs that can be used in diagnosis. This is the basis of the Computerized Electrodermal Screening (CEDS). The device used in CEDS is an electrodermal screening device, which works by measuring electrical resistance and polarization at acupuncture points and meridians. Through these safe, skin-level measurements, it is possible to analyze the bio-energy and bio-information produced by internal organs and systems. . . . CEDS is one of the most thorough, powerful, and promising modern, holistic medical/diagnostic methodologies. CEDS addresses the body holistically for a number of reasons: A standard of CEDS examination enables the operator to quickly and safely collect information on 40 different individual systems. In other words, all of the body's individual parts are covered in an examination. The bio-information signal read by the CEDS is a very direct and true description of the condition of the body because it is created by the body. . . . Product testing allows the operator to test any and every type of medication on the individual patient, including those made from herbs, metals, nosodes, or sarcodes. This allows the operator to explore all types of available treatment.

*Program's Exhibit No. 13, p. 1 (Emphasis added).*

3.6 The Respondent's website shows that she is offering to practice medicine. She solicits clients for EDT testing, providing instruction for sending to her blood and saliva samples for testing, stating her fee one hundred and fifty dollars (\$150.00) for human testing, and directing clients to fill out three forms: a "health form," a "disorder rating sheet" and a "release form". The location for correspondence was the Respondent's residence. The testing is done within the state of Washington and, at times, on Indian reservation land.

3.7 The Respondent claimed that through her Orion or Asyra devices, she can test any and every type of medication and can explore all types of available treatment.

For the combined diagnostic, prescription and dispensing services, the Respondent performs the testing in two ways, (1) by testing persons directly and (2) by testing persons' blood or saliva samples that were sent to her in the mail. After the EDT, the Respondent offers to identify appropriate dosages of a homeopathic infusion remedy and then sends the remedy by return mail.

3.8 On her website, the Respondent offers to interpret and evaluate the EDT results. She offers to identify medical illnesses or conditions through an "energy signature" obtained during the testing. The Respondent reported that she advises her clients to follow her recommendations and she provides them medicinal preparations. On her website, the Respondent reports that she conducts follow-up visits. At the follow-up visits, the Respondent adjusts the treatment by providing additional "tinctures" based on the follow-up EDT testing.

3.9 The Respondent makes a diagnosis through EDT testing to identify in persons an "electromagnetic signature, the immaterial electromagnetic signature of all kinds in their bodies, whether it's Parkinson or something else." *Program's Exhibit No. 5*, p. 98. The Respondent claimed that these electromagnetic signatures "pile up in the body" like "a worm that's activated in your computer." *Program's Exhibit No. 5*, p. 99. She maintained that "it's a very complicated process [that] even the most brilliant physicists do not yet understand." *Program's Exhibit No. 5*, p. 100. She claimed:

You know my testing is for electromagnetic signatures. And so if I see the electromagnetic signature of, let's say a pituitary tumor, then if the person's question is "could that be physical," then I would have to tell them what some of the physical indications would be, but it isn't telling them that they have the physical problem. It's just indicating to a person that these

are the physical things that they would notice if it was – if it was a physical thing. But I don't know, because I test for electromagnetic signatures.

*Program's Exhibit No. 5, p. 107.*

So if a person comes in and they have an electromagnetic signature, and the [EDT] computer says it's the electromagnetic signature as whatever it may be, say porphyria or whatever, then there is an electromagnetic signature match.

*Program's Exhibit No. 5, p. 94.*

3.10 To remedy ill health or to cause change in the client's condition, the Respondent creates a tincture, or preparation, based upon the readings from the Orion or Asyra and her analysis of them. In her deposition, the Respondent when answering questions about a tincture stated:

Q: Okay. So you create a tincture which is – what is – can you describe what the tincture is? I mean what is it – what form does it take?

A: The tincture is water and alcohol, or it is a commercial homeopathic preparation, and the recording of the electromagnetic fields is imprinted into that tincture.

Q: The record being?

A: The electromagnetic fields that are detected in the client and stored in the computer are then essentially downloaded into a tincture. And the animal is either given the tincture, or the person, if it happens to be a person, takes their own electromagnetic fields by taking it imprinted into the tincture.

Q: Okay. And what is the form that the downloaded energy takes? I mean, how is it imprinted? How does that work as a matter of mechanics or physics?

A: It is all – it's all – let me see what would be the right word. All of the signatures are stored, just like all the information in a computer, in zeros and ones. And each electromagnetic signature has its own pattern of zeros and ones, and then that's how it's stored onto the computer. And the computer just imprints the frequencies or the force fields of those patterns that are —than come from the client, imprints it into the tincture.

Q: And how do you know what tincture to use?

A: You know, there is really no set way of knowing it. What I try to do is to find a tincture that is as close to matching the electromagnetic fields of the client as possible.

Q: And how do you do that?

A: I put the – if I'm using a commercial homeopathic, then I put that homeopathic on the DCM.

Q: What is that? DCM?

A: The digital conductance meter. And it would then – the digital conductance meter then detects the electromagnetic fields in the tincture, the prepared homeopathic tincture, the over-the-counter kind you buy at the store. It would detect those electromagnetic fields, and the computer would compare those electromagnetic fields to the electromagnetic fields from the client that are stored in the computer. And the closer the match, then that tells me that a tincture, if it's a close match, that a tincture is similar to the electromagnetic fields in the client.

*Program's Exhibit No. 5*, pp. 30-32. In her website, the Respondent provides a listing of remedies and includes their prices. *Program's Exhibit No. 13*, pp. 28-30.

3.11 By publishing anecdotal testimonials on her website and by making claims of medical/diagnostic methodologies, the Respondent holds herself out as providing medical benefits to her clients. From her website, the Respondent provided a testimonial from "JM" reporting that from her testing she confirmed that JM had energy signatures of Alzheimer's, Epstein Barr virus and Chronic Fatigue Syndrome. "JM's" testimonial states:

"... after testing 5 of the prescriptions my doctors had recommended I take, [Respondent] told me NOT to take 3 of the 5. . . .

In addition to telling me NOT to take or do for the next 10 weeks, she told me to take the 8 bottles of remedies three times per day in the doses of 3 drops each time. At the end of the 10 weeks I would be re-tested with her Orion computer system."

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*Program's Exhibit No. 13*, p. 7. By providing this EDT for "JM", the Respondent undertook the diagnosis of a disease and an illness and prescribed a medicinal preparation to be used by him.

3.12 The website contained additional testimonials concerning clients S.M., R.G., J.T., K.V., J.R., J.W., L.M., N.B.D. and D.B.

S.M. had a thyroid condition and stomach pains. After an Orion, S.M. experienced immediate relief from "long-term severe cramping."

The Respondent reported that for the first time in 30 years, after undergoing Orion sessions, R.G.'s psoriasis does not "break out" when he goes off his medication.

J.T. was cured of porphyria, chemical sensitivity, and kidney/gall bladder cancer.

The Respondent reported that K.V. suffered from diabetes and a stroke. His physician gave him only nine months to live. After the Respondent's Orion (CEDs) testing and the Respondent's treatment, K.V. achieved improved circulation, increased mobility and weight loss, and could discontinue most of his medications.

J. R. claimed that his physician confirmed the results of the Respondent's "liver lab workup." J.R. experienced a dramatically-improved blood-test result after one Orion session. The blood tests results were even posted on the website.

J.W. experienced better "oxygen levels" from Orion for one week.

L.M. claimed that the Respondent's "Orion balancing" improved his "thinking" and made it easier to walk when he woke in the morning. The Respondent identified L.M.'s "pituitary tumor" and then he stopped urinating too frequently because of the "balancing." The treatment also cured L.M.'s multiple chemical sensitivity and his pain "in the area of the gallbladder."

After treating her cat (an animal), N.B.D. stated that the Respondent treated him for a "really bad" lymph system and thyroid.

The Respondent treated D.B., a seriously-ill cancer patient, with an Orion session.

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*Program's Exhibit No. 13*, pp. 9-12. The Respondent posted these testimonials in an attempt to attract new customers by presenting herself as a healer.

3.13 On her website and in a similar fashion, the Respondent solicited submissions of saliva and blood samples from animals for EDT to identify pathogens, toxins, and organ and emotional dysfunctions. The Respondent quoted a fee of one hundred fifteen dollars (\$115.00) for these combined diagnostic, prescription, and dispensing services. The Respondent claims that by using EDT, she is able to prescribe various remedies for the animals to cure their determined ailments.

3.14 The Respondent included "case histories" for eleven (11) dogs and cats that underwent electrodermal testing. Through these case histories, the Respondent states and implies that through EDT she has successfully diagnosed and/or treated animals for variety of conditions that most commonly would be treated by a veterinarian, including the following: (1) "[S]evere candida problem brought on by Thimerosal (Vaccine Additive)"; (2) Growing hair on bald spots; (3) Regain of "motor function" after a "major bi-lateral stroke"; (4) Reduction of a "lump in the groin area"; (5) Improved mobility; (6) Weaned off codeine; (7) Binge eating; (8) Hyperactivity; (9) Improved disposition; (10) Restored health; (11) Migraines; (12) Back pain; (13) "Emotional problems"; (14) Restored energy; (15) Weight gain; and (16) Kidney failure. *Program's Exhibit No. 13*, pp. 16-26. Regarding a collie named "Shasta", the Respondent claimed that after just one Orion test and infusion drops of healing energies, Shasta's liver enzymes improved dramatically. *Program's Exhibit No. 13*, p. 21.

3.15 Using the Orion, the Respondent has performed EDT on between 10 to 50 pets. The pet owner sends by mail the saliva from the animal on a Q-tip. *Program's*

*Exhibit No. 5*, p. 16-17. When the Respondent personally sees an animal with the owner, the EDT is performed by placing the probe in the hand of the owner, who acts as a “surrogate for delivering the animal’s electromagnetic fields into the computer.”

*Program's Exhibit No. 5*, p. 21. The Respondent offered to identify an appropriate dosage of homeopathic infusion remedy, based upon such testing results and send the remedy by return mail.

3.16 On her website, the Respondent represents her ability and willingness for a fee to diagnose and treat animals. Further, the Respondent has diagnosed animal diseases and injuries and prescribed treatment for them.

#### IV. CONCLUSIONS OF LAW

4.1 The Presiding Officer shall rule on motions. WAC 246-10-403; WAC 246-10-602(2)(e). An administrative agency may employ summary procedures, and may enter an order summarily disposing of a matter if there is no genuine issue of material fact. *Asarco v. Air Quality Coalition*, 92 Wn.2d 685, 696-697 (1979).

4.2 Summary Judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982) (citations omitted).

4.3 In considering a motion for summary judgment, the health law judge must consider the facts in light most favorable to the nonmoving party, and grant summary judgment if reasonable persons could reach only one conclusion. *Id.*

4.4 The moving party carries the initial burden of show there is no genuine issue of material fact, but once that burden has been met, the burden shifts to the

nonmoving party to establish otherwise. *Dutton v. Washington Physicians*, 87 Wn. App. 614, 621 (1997) citing *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66 (1992).

4.5 In this case, the Respondent is not objecting to the statements or representations made on her website or statements made in her deposition. The facts obtained from these and other documents, not objected to, form a basis to conclude that there are no genuine issues of material fact. Further, in support of the Respondent's summary motion, the Respondent's seeks summary judgment in her favor on the basis of legal arguments. The Presiding Officer can consider the undisputed facts and apply the appropriate law here.

4.6 The provisions in RCW 18.130 (the Uniform Disciplinary Act) are intended to "assure the public of the adequacy of professional competence and conduct in the hearing arts." RCW 18.130.010. To carry out the provisions of the UDA, the Program has authority to issue Cease and Desist orders against persons who engage in the practice of various health care professions without having a required license to do so.

The secretary may issue a notice of intention to issue a cease and desist order to any person whom the secretary has reason to believe is engaged in the unlicensed practice of a profession or business for which a license is required by the chapters specified in RCW 18.130.040.

RCW 18.130.190(2). In this case, the Program issued upon the Respondent a Notice of Intent to issue a cease and desist order alleging that the Respondent's conduct constituted the unlicensed practice of medicine and veterinary medicine.

4.7 Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of

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evidence. RCW 34.05.461(5). In evaluating the evidence here, the Presiding Officer employed the agency's expertise.

Respondent's Motion for Summary Judgment.

4.8 The Respondent argued that this action should be dismissed because her conduct of using an EDT device was outside the scope of the UDA and so the Program had no authority over her EDT businesses. The practice of medicine is defined under chapter 18.71 RCW:

Definition of practice of medicine — . . . A person is practicing medicine if he does one or more of the following:

- (1) Offers or undertakes to diagnose, cure, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality;
- (2) Administers or prescribes drugs or medicinal prescriptions to be used by other person;

RCW 18.71.011(1) & (2).

4.9 The Respondent's argument that her EDT activity does not come under this statute is without merit. This statute, RCW 18.71.011(1) & (2), applies whenever someone purports to diagnose or treat a human illness or condition. The plain language of the statute does not differentiate between types of diagnosis or treatment; it covers them all. The statute's broad definition also applies to types of "alternative" or "drugless" diagnosis or treatment that are not traditionally offered by physicians. The definition applies to diagnosis or treatment that allegedly is based on some type of "non-medical" theory; that is, under the definition, the theory behind the diagnosis or treatment is irrelevant.

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4.10 The Respondent's argument that the applicable statutes are ambiguous and that the legislature intended to allow alternative non-traditional medical modalities is also without merit. In interpreting such statutes, the Presiding Officer can obtain guidance from relevant case law:

The meaning of a statute is a question of law that is reviewed de novo. The Court's fundamental objective in determining what a statute means is to ascertain and carry out the Legislature's intent. If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended. A statute that is clear on its face is not subject to judicial construction.

*State v. J.M.*, 144 Wn.2d 472, 480 (2001) (citations omitted). The meaning of the applicable statutes here regarding the practice of medicine (RCW 18.71.011(1); RCW 18.71.021), regarding the practice of veterinary medicine (RCW 18.92.010; RCW 18.92.070) and the UDA (RCW 18.130.190) are plain on their face. They are clear and not ambiguous. Thus, it is not necessary, as argued by the Respondent, to ferret out legislative intent to determine the unlicensed practice of these professions.<sup>1</sup>

4.11 The Respondent argued that RCW 18.71.011(1) should not be construed to allow only licensed physicians to offer healing services is in part correct:

The practice of dentistry, osteopathic medicine and surgery, nursing, chiropractic, podiatric medicine and surgery, optometry, naturopathy, or any such other healing art licensed under the methods of means permitted by such license.

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<sup>1</sup> The Program's footnote is also applicable here when it stated: "On her website, Ms. Tasker urged support of House Bill 2355, a radical revision of the law that went no where in the legislature." *Program's Exhibit No. 13*, p. 13. "Section 3 of the 2004 bill would have eliminated the licensing requirement, except for persons performing the most serious medical procedures, so long as the providers made certain disclosures." *Program's Exhibit No. 14*, pp. 4-5 (House Bill 2355, 58<sup>th</sup> Legislature, 2004 Regular Session (2004)). "If passed, the bill apparently would have allowed Ms. Tasker to perform EDT without a license. However, because the bill did not pass, Ms. Tasker remains subject to licensure." *Program's Motion for Summary Judgment and Supporting Memorandum*, p. 8, ftn 22.

RCW 18.71.030(4) (Emphasis added). Under this statute, a particular healing art may be practiced by non-physicians who are licensed to conduct the activity in accordance with the terms of the license. Contrary to the Respondent's argument, nothing in RCW 18.71 states or even implies that unlicensed persons, such as the Respondent, should be allowed to practice a healing art. Further, under RCW 18.71.030, there are fourteen (14) listed exemptions from the medical licensing requirement, none of which exempt the practice of "alternative medicine", "drugless healing" or the use of EDT devices.

4.12 The Respondent argued that RCW 18.71.011(1) applies only to licensed physicians is without merit. Under RCW 18.130.190, the Program has authority to issue a cease and desist order against anyone who has "engaged in the unlicensed practice of a business or profession for which a license is required by the chapters specified in RCW 18.130.040." One of those professions is the practice of medicine under chapter 18.71 RCW. RCW 18.130.040(2)(b)(ix). Another one of those professions is the practice of veterinary medicine under chapter 18.92 RCW. RCW 18.130.040(2)(b)(xiv).

4.13 The Respondent argued that the EDT, which she performs, is safe, because the instruments that she used, a biofeedback machine, has been approved by the Federal Food and Drug Administration (FDA). As part of this argument, the Respondent asserted that because her EDT activity is safe, there is no need for licensing and the statutes here do not apply. This argument is also without merit. The FDA cleared the DCM as a biofeedback device for relaxation training, but not for other

purposes. The EDT devices like the biofeedback devices are safe in that they emit a very low voltage. Nevertheless, assuming that the Respondent's EDT devices are the same as those that perform relaxation training, the Respondent's use of EDT devices has been done in a manner not intended by the FDA and in a manner of practicing unlicensed medicine and unlicensed veterinary medicine.

4.14 Further, there are dangers in allowing such unlicensed practice. The unlicensed practitioner will (1) offer care that is harmful to a customer's health because the practitioner lacks the expertise; (2) cause persons not to seek needed health-care advice from qualified professionals; and (3) defraud customers by providing worthless treatment in exchange for the customer's money. *See Respondent's Exhibit 3*, p. 5. In *Griffith v. Dept. of Motor Vehicles*, 23 Wn. App. 722 (1979), the court held that the legislature has the constitutional authority to regulate health-care licensing. By issuing such laws, the legislature is exercising the state's police power to ensure public health, safety, and welfare. "It is a legitimate regulatory expression where the legislature seeks to prevent the inadequately trained and uneducated from practicing in areas in which competency is lacking." *Griffith v. Dept. of Motor Vehicles*, 23 Wn. App. at 730.

4.15 The Respondent argued that the "Disclaimer" on her website sufficiently informs the public that she is not offering medical or veterinary care. This argument is without merit. Nothing either in RCW 18.71 (Physicians) or in RCW 18.92 (Veterinary Medicine) allows a person to avoid the licensing requirement simply by making a disclaimer. Otherwise, persons could do anything they wanted as long as said they

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were not practicing medicine or veterinary medicine. The licensing requirement would be so easy to avoid that it would become meaningless.

4.16 Finally, the Respondent argued that the Program's policy violates the due process clause of the Fourteenth Amendment, because it unduly burdens her fundamental rights and is not justified by any compelling state interest. The Presiding Officer is required to follow the applicable rules and statutes. WAC 246-10-602(3)(a). The Presiding Officer lacks authority to declare a statute unconstitutional. WAC 246-10-602(3)(c).

4.17 In conclusions, the Respondent has failed to show that her EDT activity performed on persons and on animals is outside the scope of the UDA and that the Program lacks the authority to maintain this unlicensed practice action against her. For the above reasons, the Respondent's motion for summary judgment seeking dismissal of this action should be denied.

Program's Motion for Summary Judgment.

4.18 Under RCW 18.130.190, the Program has authority to issue Cease and Desist orders against persons who engage in the practice of various health care professions without having a required license to do so. RCW 18.130.190(2). In this case, the Program had authority to issue a Notice of Cease and Desist Order against the Respondent for the unlicensed practice of medicine and veterinary medicine.

4.19 The statutes define the practice of medicine and require those who practice medicine to have a license:

Definition of practice of medicine — . . . A person is practicing medicine if he does one or more of the following:

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(1) Offers or undertakes to diagnose, cure, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality;

RCW 18.71.011(1) (Emphasis added).

License required. No person may practice or represent himself or herself as practicing medicine without first having a valid license to do so.

RCW 18.71.021.

4.20 In this case, the Respondent does not have a license to practice as a physician in the state of Washington. The Presiding Officer concludes that the Program has proven by a preponderance of the evidence that the Respondent's conduct as described in Paragraphs 3.1 through 3.12 constituted the unlicensed practice of medicine in violation of RCW 18.71.021 as defined in RCW 18.71.011(1).

4.21 The statutes also define the practice of veterinary medicine and require those who practice veterinary medicine to have a license.

Veterinary practice defined. Any person shall be regarded as practicing veterinary medicine, surgery and dentistry within the meaning of this chapter who shall, within this state,

(1) by advertisement, or by any notice, sign, or other indication, or by a statement written, printed or oral, in public or private, made, done, or procured by himself or herself, or any other, at his or her request, for him or her, represent, claim, announce, make known or pretend his or her ability or willingness to diagnose or prognose or treat diseases, deformities, defects, wounds, or injuries of animals;

(2) or who shall so advertise, make known, represent or claim his or her ability and willingness to prescribe or administer any drug, medicine, treatment, method or practice, or to perform any operation, manipulation, or apply any apparatus or appliance for cure, amelioration, correction or reduction or modification of any animal disease, deformity, defect, wound or injury, for hire, fee, compensation, or reward, promised, offered, expected, received, or accepted directly or indirectly;

(3) or who shall within this state diagnose or prognose any animal diseases, deformities, defects, wounds or injuries, for hire, fee, reward, or

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compensation promised, offered, expected, received, or accepted directly or indirectly;

(4) or who shall within this state prescribe or administer any drug, medicine, treatment, method or practice, or perform any operation, or manipulation, or apply any apparatus or appliance for the cure, amelioration, alleviation, correction, or modification of any animal disease, deformity, defect, wound, or injury, for hire, fee, compensation, or reward, promised, offered, expected, received or accepted directly or indirectly;

...

#### RCW 18.92.010

Applications — Procedure — Qualifications — Eligibility to take examination. No person, unless registered or licensed to practice veterinary medicine, surgery, and dentistry in this state at the time this chapter shall become operative, shall begin the practice of veterinary medicine, surgery and dentistry without first applying for and obtaining a license for such purpose from the secretary.

...

#### RCW 18.92.070

4.22 In this case, the Respondent does not have a license to practice veterinary medicine in the state of Washington. The Presiding Officer concludes that the Program has proven by a preponderance of the evidence that the Respondent's conduct as described in Paragraphs 3.1 through 3.10 and Paragraphs 3.13 through 3.16 constituted the unlicensed practice of veterinary medicine in violation of RCW 18.92.070 as defined in RCW 18.92.010.

4.23 The violations of unlicensed practice of medicine and of the unlicensed practice of veterinary medicine are grounds for issuance of a cease and desist order pursuant to RCW 18.130.190:

Practice without license — Investigation of complaints — Cease and desist orders — Injunctions — Penalties. . . .

(3) If the secretary makes a final determination that a person has engaged or is engaging in unlicensed practice, the secretary may issue a cease and desist order. In addition, the secretary may impose a civil fine in an amount not exceeding one thousand dollars for each day upon which the person engaged in unlicensed practice of a business or profession for which a license is required by one or more of the chapters specified in RCW 18.130.040. The proceeds of such fines shall be deposited to the health professions account.

RCW 18.130.190(3). In this case a cease and desist order should be issued.

4.24 Regarding the fine, the Presiding Officer considered the fact that she has been advertising her services through her website since 2003 when the Department received a complaint against her. The Respondent acquired the Orion device in 2002. The Respondent has a certificate indicating that she started EDT in 2001. She admits to having offered and provided services to humans and animals. Under the statute here, the Respondent would be required to pay a one thousand dollar fine for each day of unlicensed practice of medicine and veterinary medicine. The Presiding Officer considered the following aggravating factors. The Respondent undertook to treat ill people even though she has no health care degree or work experience. The Respondent treated people with very serious illnesses, which could result in further sickness or death. The Respondent, as shown with "JM's" case, advised a customer to follow her medication advice over the advice of a physician. The Respondent charged \$150.00 for her EDT testing. The Respondent aggressively marketed her business through her website. On the whole, the Respondent's violations were egregious, because her website made sweeping and unsupportable claims about her ability to treat humans and animals, and she specifically targeted people who were very ill. As a result of this egregious conduct, the Respondent should pay a fine in the amount of ten

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thousand dollars. There should be a suspension of a part of the fine provided that she complies with this cease and desist order.

## **V. ORDERS**

Based upon the above, the Presiding Officer hereby issues in this case the following ORDERS:

5.1 The Respondent's Motion for Summary Judgment is DENIED.

5.2 The Program's Motion for Summary Judgment is GRANTED; accordingly, the dates for the prehearing conference and the hearing are STRICKEN.

5.3 The Respondent shall immediately CEASE AND DESIST from and is PROHIBITED from doing the following within the state of Washington (including Indian reservation land):

5.3.1. Without obtaining a license to practice medicine under RCW 18.71:

a. From offering (through verbal or written statements, a website, flyer, or any other means of communication or advertisement) to use on a person (or on a person's saliva or blood sample) any instrumentality (including any type of galvanic skin response device, DCM or EDT device, including the Orion or Asyra) in order to diagnose, treat, assess, test for or identify any human disease, ailment, injury, deformity, pain, or other condition, physical or mental, real or imagined. This prohibition shall include, but not be limited to, using an instrumentality in order to identify pathogens, toxins, organ or emotional dysfunctions, "energy imbalances", or "electromagnetic signatures" within a human body. The prohibition applies whether or not the service is offered or performed in return for compensation.

b. From prescribing or administering any drugs or medicinal preparations, including, but not be limited to, homeopathic remedies or tinctures, for use on any other person. This prohibition applies whether or not the medications are offered or provided in return for compensation.

5.3.2 Without obtaining a license to practice veterinary medicine under RCW 18.92:

a. From offering (through verbal or written statements, a website, flyer, or any other means of communication or advertisement) to use on any animal (or on an animal's saliva or blood sample) any instrumentality (including any type of galvanic skin response device, DCM or EDT device, including the Orion or Asyra) in order to diagnose, treat, or test for or to identify any diseases, defects, wounds, ailments, deformities, pain, or injuries, of animals. This prohibition shall include, but not be limited to, using any instrumentality to identify pathogens, toxins, organ or emotional dysfunctions, "energy imbalances", or "electromagnetic signatures" within or on an animal's body. The prohibition applies whether or not the service is offered or performed in return for compensation.

b. From prescribing or administering any drug, medicine (including homeopathic remedies or tinctures), treatment, method, or practice, or performing or conducting any operation or manipulation, or applying any apparatus, appliance or instrumentality (including any type of galvanic skin response device, DCM or EDT device, including the Orion or Asyra), or diagnosing or prognosing, for the cure, alleviation, correction, or modification of any animal disease, deformity, defect, wound

or injury. This prohibition shall include, but not be limited to, using any method or device to identify pathogens, toxins, oral or emotional dysfunction, "energy imbalances", or "electromagnetic signatures" within an animal's body. The prohibition applies whether or not the service is offered or performed in return for compensation.

5.3.3 The Respondent shall refrain from engaging in any other activity, which constitutes the unlicensed practice of a health care profession in violation of RCW 18.130.190.

5.4 The Respondent shall pay an administrative fine to the Program Manager in the amount of \$10,000.00 (ten thousand dollars) within 180 days (one hundred and eighty days) of the entry of this Order, PROVIDED THAT \$6,000.00 (six thousand dollars) shall be SUSPENDED on the condition that the Respondent timely pays \$4,000.00 (four thousand dollars) and refrain from any future unlicensed practice violation. The payment shall be made payable to the Department of Health and sent to the following address:

Unlicensed Practice Program  
PO Box 1099  
Olympia, WA 98507-1099

Dated this 25<sup>th</sup> day of January, 2006.

  
ARTHUR E. DeBUSSCHERE, Health Law Judge  
Presiding Officer

## CLERK'S SUMMARY

<b>Charge</b>	<b>Action</b>
RCW 18.71.021	Violated
RCW 18.92.070	Violated

## NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate/national reporting requirements. If adverse action is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either Party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this Order with:

Adjudicative Service Unit  
PO Box 47879  
Olympia, WA 98504-7879

and a copy must be sent to:

Unlicensed Practice Program  
PO Box 47874  
Olympia, WA 98504-7874

The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

ORDER ON MOTIONS FOR SUMMARY  
JUDGMENT, ORDER TO CEASE AND  
DESIST, AND ORDER TO PAY FINE

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The order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

<p><b>FOR INTERNAL USE ONLY:</b> (Internal tracking numbers) Program No. 2003-06-0016</p>
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ORDER ON MOTIONS FOR SUMMARY  
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## **ATTACHMENT 2**

Westlaw.

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**C**

State v. Pacific Health Center, Inc. Wash.App. Div. 1, 2006.

Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,

v.

PACIFIC HEALTH CENTER, INC., a Washington for-profit corporation; Pacific Health Center Spokane, Inc., a Washington for-profit corporation; and Monte Kline, individually and on behalf of his marital community, as President and Secretary of Pacific Health Center, Inc. and Pacific Health Center Spokane, Inc., Appellants.

**No. 56886-8-I.**

Sept. 25, 2006.

**Background:** The State filed action against alternative health care practitioners, alleging that they violated the Consumer Protection Act (CPA) because their alternative health care practice, based primarily on electrodermal testing, constituted the unlicensed practices of medicine, naturopathy, and acupuncture. The Superior Court, King County, Mary I. Yu, J., granted the State summary judgment and defendants appealed.

**Holdings:** The Court of Appeals, Agid, J., held that:

(1) defendants engaged in the practice of medicine; and

(2) defendant's did not violate the CPA.

Affirmed in part, reversed in part and remanded.  
West Headnotes

**[1] Appeal and Error 30 ⚡893(1)**

30 Appeal and Error  
30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate  
Court

30k893(1) k. In General. Most  
Cited Cases

Statutory interpretation and the question whether a statute applies to a particular set of facts are issues of law Court of Appeals reviews de novo.

**[2] Statutes 361 ⚡181(1)**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most  
Cited Cases

**Statutes 361 ⚡188**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited  
Cases

**Statutes 361 ⚡190**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.  
Most Cited Cases

**Statutes 361 ⚡208**

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

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## Aids to Construction

361k208 k. Context and Related Clauses. Most Cited Cases

When interpreting statutes, court's primary goal is to ascertain and give effect to legislative intent, beginning with the statute's plain language and ordinary meaning, and also looking to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole; if the statute remains susceptible to more than one reasonable meaning, it is ambiguous and court may resort to construction aids.

**[3] Health 198H ↪175**

## 198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk162 Unauthorized Practice

198Hk175 k. Spiritualists, Naturopaths, and Other Non-Medical Practitioners. Most Cited Cases

Alternative health practitioners engaged in the practice of medicine by using electrodermal testing (EDT), offering services to people with various afflictions and telling them they could help them feel better; they did not merely identify and treat energetic imbalances rather than actual physical or mental conditions, but they represented that they could help people with arthritis, immune deficiencies, high cholesterol, and other physical conditions. West's RCWA 18.71.030.

**[4] Health 198H ↪175**

## 198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk162 Unauthorized Practice

198Hk175 k. Spiritualists, Naturopaths, and Other Non-Medical Practitioners. Most Cited Cases

Alternative health practitioners use of electrodermal testing (EDT) as an instrumentality to determine, or "diagnose," medical conditions in a patient and then recommending and selling specific remedies to that person to address those conditions, were practices that unquestionably fall within the valid police

power the legislature exercised when it regulated the practice of medicine. West's RCWA 18.71.030.

**[5] Health 198H ↪175**

## 198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk162 Unauthorized Practice

198Hk175 k. Spiritualists, Naturopaths, and Other Non-Medical Practitioners. Most Cited Cases

Alternative health practitioners who used electrodermal testing (EDT) as an instrumentality to determine, or "diagnose," medical conditions in a patient practiced naturopathy, where they did more than simply recommend homeopathics or render nutritional advice, but prescribed and mixed specific homeopathic remedies based on a specific client's EDT results. West's RCWA 18.36A.040.

**[6] Health 198H ↪175**

## 198H Health

198HI Regulation in General

198HI(B) Professionals

198Hk162 Unauthorized Practice

198Hk175 k. Spiritualists, Naturopaths, and Other Non-Medical Practitioners. Most Cited Cases

Alternative health practitioners who used electrodermal testing (EDT) as an instrumentality to determine, or "diagnose," medical conditions in a patient practiced acupuncture; the statute requires only that the electrical devices stimulate acupuncture points and meridians to qualify as acupuncture, and does not require that the electrical device actually treat anything. West's RCWA 18.06.010.

**[7] Antitrust and Trade Regulation 29T ↪128**

## 29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk126 Constitutional and Statutory Provisions

29Tk128 k. Purpose and Construction



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in General. Most Cited Cases

### **Antitrust and Trade Regulation 29T ↪136**

#### **29T Antitrust and Trade Regulation**

#### **29TIII Statutory Unfair Trade Practices and Consumer Protection**

##### **29TIII(A) In General**

##### **29Tk133 Nature and Elements**

##### **29Tk136 k. Fraud; Deceit;**

##### **Knowledge and Intent. Most Cited Cases**

The Consumer Protection Act (CPA) prohibits unfair or deceptive trade practices; conduct need not be intentional to be unfair or deceptive as long as it has the capacity to deceive a substantial portion of the public. West's RCWA 19.86.020.

### **[8] Antitrust and Trade Regulation 29T ↪222**

#### **29T Antitrust and Trade Regulation**

#### **29TIII Statutory Unfair Trade Practices and Consumer Protection**

##### **29TIII(C) Particular Subjects and Regulations**

##### **29Tk222 k. Health Care and Medical Insurance. Most Cited Cases**

Alternative health practitioners who used electrodermal testing (EDT) to diagnose and treat conditions engaged in the practice of medicine, but they did not violate the Consumer Protection Act (CPA) absent proof they were in fact not skilled in using EDT; to prove a deceptive practice, the State must demonstrate that practitioners were not skilled in doing what they represented to the public they could do. West's RCWA 19.86.020.

\*619 William R. Bishin, Seattle, for Appellants.

Paula Lillian Selis, Cheryl Deshon Kringle, Katherine M. Tassi, Attorney General's Office, Seattle, Richard A. McCartan, Melissa A. Burke-Cain, Attorney General's Office, Olympia, for Respondent.

\*620 AGID, J.

¶ 1 The trial court granted the State's motion for partial summary judgment, ruling that the defendants violated the Consumer Protection Act (CPA) because their alternative health care practice, based primarily on electrodermal testing, constituted the unlicensed practices of medicine,

naturopathy, and acupuncture. The defendants appealed both the trial court's ruling and the penalty it imposed, arguing the award was excessive.

¶ 2 We agree with the trial court's ruling that, although the defendants use alternative practice methods and terminology, their actual practices fall under the statutory definitions of medicine, naturopathy, and acupuncture. But practicing any of these disciplines without a license is not a per se CPA violation. The State failed to prove defendants did not have the level of competence they represented to the public or that any member of the public was even potentially injured by their actions. As such, the State did not prove a violation of the Act. Because the State did not prove defendants violated the CPA, the trial court also erred in imposing penalties under that statute. We affirm in part and reverse in part.

### **FACTS**

¶ 3 Monte Kline and his close corporation, Pacific Health Center (PHC), have operated a health care practice in Washington for over 15 years. They advertise through brochures, radio, the internet, and seminars. Their practice consists primarily of using electrodermal testing (EDT) to detect imbalances in "Qi", the Oriental medicine concept of energy flow in the body.<sup>FN1</sup> Essentially, EDT uses a computerized, signal-emitting galvanic skin response (GSR) device to measure changes in electrical conductance at acupuncture points on a person's hands. Based on the imbalances detected during EDT, PHC employees recommend and provide various remedies including dietary changes, nutritional supplements, homeopathic mixtures and herbs.

FN1. Kline explains this energy flow as follows: "In terms of Oriental medicine theory, there is an assumption that there is an ideal energy flow level on the different acupuncture meridians that correlates with optimum health. And when you have an imbalance which could be characterized as an overenergized or underenergized

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meridian, that creates a disturbance which ..  
ultimately could create a specific health  
problem.”

¶ 4 On the opening page of their website, PHC asks “Are you sick & tired ... of being sick & tired?”

They claim they can help with a variety of conditions, including candida, high cholesterol, allergies, and immune deficiencies. They describe EDT as follows:

This revolutionary analysis technique ... was pioneered by renowned West German physician, Reinhold Voll, M.D. in 1953. Various methods of Electrodermal Testing are currently used by over 40,000 medical doctors in Europe and by an increasing number of health practitioners in the United States.

Electrodermal Testing involves taking simple, painless, electrical resistance readings on the surface of the skin at acupuncture points on the finger. The subtle differences in the electrical resistance detected by the sophisticated testing instrument determines specifics such as nutrient deficiencies, food and environmental sensitivities, toxicities, energetically weak organs...

... adding to the circuit homeopathic dilutions of various foods, environmental substances, nutrients, toxins, etc. [to] change the skin resistance readings, indicating a ‘yes’ or ‘no’ relative to a particular test. These filters, originally in test vials, are now recorded electronically in the computer for simpler testing.

The computerized Electrodermal Testing allows the practitioner to test vitamins, minerals, enzymes, herbs, and homeopathic remedies for their “balancing effect” on the body, measured by their improving previously poor test readings. Thus, the guesswork of nutritional programs is eliminated.

Electrodermal Testing has been described as a method of “conducting an electronic interview with the human body.” Not too unlike the electronic measurements of Dr. McCoy of “Star Trek” fame, we believe Electrodermal Testing is the health care of the 21st century.

PHC offers a money-back guarantee. They also provide clients a form called a “Superbill”<sup>\*621</sup> that lists various “Diagnostic Categories” including allergy, P.M.S., fibromyalgia and multiple vitamin

deficiencies.

¶ 5 PHC's radio program, seminars, and website expressly state that Kline is not a physician or naturopath and that his Ph.D. and expertise are in holistic nutrition.<sup>FN2</sup> They provide prospective clients with a letter stating that PHC is a “non-medical, complementary health practice” which primarily uses EDT, which “measures the body on a different level than conventional medicine tests[.] ... It is considered an investigational technology.... We encourage our clients to have regular physical examinations and appropriate conventional tests from their medical doctor.” At the first appointment, the client signs a disclosure/authorization form stating that the Food and Drug Administration (FDA) has not approved the GSR device to assess “nutritional deficiencies, food allergies, the presence of toxins, Candida, Epstein-Barr virus, or weakness of organs or glands.”<sup>FN3</sup> It also states:

FN2. Kline's Ph.D. is a correspondence degree based on a volume of work he submitted over a number of years.

FN3. (Emphasis omitted.)

I understand that the staff of Pacific Health Center are not medical or naturopathic physicians. I understand that Electrodermal Testing does not fall under state licensure requirements, and the staff of [PHC] function as nutritional consultants, as allowed by law. I do not seek nor have the [PHC] staff offered medical diagnosis, cure, advice, or treatment for any particular disease[.] ailment, injury, infirmity, deformity, pain, or other physical or mental condition. I understand that [PHC] staff will not administer or prescribe any drugs or medicinal preparations. Rather, I understand this program focuses on building health through nutritional balancing, desensitization and detoxification.<sup>[FN4]</sup>

FN4. (Emphasis omitted.)

No one at PHC holds any Washington health

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practice licenses.

¶ 6 The State began an action against PHC and Kline on September 29, 2003, alleging violations of the Consumer Protection Act, chapter 19.86 RCW, in three separate counts. Count one alleged appellants made unsubstantiated claims about what EDT could do, count two alleged they misled the public into thinking they were physicians practicing medicine, and count three alleged that the GSR device was deceptive because the FDA had not approved it for their chosen use. On February 7, 2005, the Department of Health (DOH) alleged in an administrative action that PHC and Kline engaged in the unlicensed practices of medicine, naturopathy, and acupuncture. On March 1, 2005, the State amended its complaint to delete the FDA-related count and add three new CPA counts, one for each of appellants' alleged unlicensed practices. DOH's administrative action was stayed, and on August 10, 2005, DOH filed an action for injunctive relief in Superior Court.

¶ 7 After the trial court consolidated the State and DOH actions, the State moved for partial summary judgment on the three alleged unlicensed practice-related CPA violations. At the hearing on the State's motion, the State said it was not asking the court to decide whether EDT was a valid modality, but only whether appellants were practicing medicine, naturopathy, and/or acupuncture. The court granted the motion, ruling that appellants violated the CPA by engaging in the unauthorized practices of medicine, naturopathy and acupuncture. The trial judge specifically found a violation of the CPA based on the *Bowers* decision.<sup>FN5</sup> She said her ruling was a narrow one:

FN5. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 675 P.2d 193 (1983). "Let me just state also for the record, just so that it's addressed specifically, and anybody reviewing this understands that under *Bowers* I do believe that this court's determination that there has been a lawyer's practice is a violation of the Consumer Protection Act."

I didn't think there were any factual questions as to what the practices of the defendants were. So there [were] no factual questions. The sole question that came before me today is: Are those practices then required to be licensed under the statute? And the three statutory provisions that the State cited were ones, as we all know, governing certain practices, either of medicine, naturopathic medicine or \*622 acupuncture. I found those acts, as a matter of law, fall under those statutes. I didn't go further than that. And I honestly don't know what's left of the complaint.

She "found as a matter of law, because of the type of practices, that it was a violation of the Consumer Protection Act. We did not go any further than that in making any determination or assessment about the validity or treatments of these tools or modalities."<sup>FN6</sup> The court granted injunctive relief enjoining appellants' unlawful actions, but permitted appellants to operate as nutritionists as allowed under RCW 18.138. It ordered a civil penalty of \$1 million and restitution in the amount of \$701,630.11.<sup>FN7</sup> On November 29, 2005, the court entered a final judgment amount of \$1,997,011.40, including civil penalties, restitution, costs and attorney fees.

FN6. At the end of the hearing, after the parties discussed the proposed order, the court confirmed that she was not ruling on the validity of EDT as a practice method:

I never reached the merits of this machine in terms of whether it was effective or not, whether it was science-based or not. That was not the issue. The issue was simply were his practices as he prescribed the materials the unlicensed-or the practice, frankly, within the three statutes-are [they] actions that should be licensed under those three statutes? That is the sole basis for the decision....

FN7. The court found appellants had committed 9,426 separate violations within the statute of limitations' allowable period on the State's claim. It awarded slightly more than \$100 per violation. On September 30, 2005, the court amended

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the order specifying the terms of the consumer restitution payment, and on October 11 the court entered an order clarifying that it had granted DOH's request for injunctive relief as part of the original summary judgment ruling.

## DISCUSSION

### I. Practice of Medicine, Naturopathy, and/or Acupuncture<sup>FN8</sup>

FN8. The State has moved to strike portions of appellant's reply brief, asserting that the "legislative facts" appellants cite are not facts at all and this court should not take judicial notice of them. They have no bearing on our decision, so we deny the State's motion to strike. The State has also moved for sanctions under RAP 10.2(i) and RAP 18.9 because PHC mailed its reply brief late. RAP 18.9 provides that we may order a party to pay sanctions for failing to comply with appellate rules. The postal date stamp on the reply brief is April 27, 2006, two days after the April 25, 2006 extended deadline. Appellants argue they put the envelope in the mail on April 26, which was still one day late. But the State does not contend that it was harmed by the short delay, and we decline to impose sanctions for such a minor transgression.

¶ 8 We review summary judgment orders de novo, making the same inquiry as the trial court.<sup>FN9</sup> Summary judgment is proper only when there is no genuine issue about any material fact, and the moving party is entitled to a judgment as a matter of law.<sup>FN10</sup> We consider all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>FN11</sup> Questions of fact may be determined as a matter of law when reasonable minds can reach only one conclusion.<sup>FN12</sup>

FN9. *Jones v. Allstate Ins. Co.*, 146

Wash.2d 291, 300, 45 P.3d 1068 (2002).

FN10. CR 56(c).

FN11. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

FN12. *Hartley v. State*, 103 Wash.2d 768, 775, 698 P.2d 77 (1985) (citing *La Plante v. State*, 85 Wash.2d 154, 531 P.2d 299 (1975); *Balise v. Underwood*, 62 Wash.2d 195, 381 P.2d 966 (1963)).

[1][2] ¶ 9 The first question this court must answer is whether PHC practices medicine, naturopathy, and/or acupuncture as the Washington Legislature has defined those professions. Statutory interpretation and the question whether a statute applies to a particular set of facts are issues of law we review de novo.<sup>FN13</sup> When interpreting statutes, our primary goal is to ascertain and give effect to legislative intent.<sup>FN14</sup> We begin with the statute's plain language and ordinary meaning, but also look to "the applicable legislative enactment as a whole, harmonizing its provisions by reading them in \*623 context with related provisions and the statute as a whole."<sup>FN15</sup> If the statute remains susceptible to more than one reasonable meaning, it is ambiguous and we may resort to construction aides.<sup>FN16</sup>

FN13. *State v. Jackson*, 91 Wash.App. 488, 491, 957 P.2d 1270 (1998) (citing *State v. Tatum*, 74 Wash.App. 81, 86, 871 P.2d 1123 (1994)), review denied, 137 Wash.2d 1038, 980 P.2d 1285 (1999).

FN14. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wash.2d 224, 238, 110 P.3d 1132 (2005) (citing *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 555, 14 P.3d 133 (2000)).

FN15. *Id.* at 239, 110 P.3d 1132 (citing *King County*, 142 Wash.2d at 555, 560, 14 P.3d 133).

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FN16. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wash.2d 226, 242-43, 88 P.3d 375 (2004).

¶ 10 In Washington, anyone practicing medicine, naturopathy, or acupuncture must have a valid current license.<sup>FN17</sup> DOH may obtain an injunction preventing a party from practicing without a license.<sup>FN18</sup> To determine whether PHC's practice falls under any or all of the three licensed practices at issue, we have to determine what EDT is and how PHC uses it. Like the trial court, we do not reach the merits of EDT as a health care modality, but instead only consider whether PHC's practice falls under the statutes.

FN17. RCW 18.71.021 (medical doctor); RCW 18.36A.030 (naturopathy doctor); RCW 18.06.020 (acupuncture).

FN18. RCW 18.130.190(6).

¶ 11 A client's initial appointment takes about an hour and half and typically costs \$395.<sup>FN19</sup> The client fills out a confidential client information form that asks, among other things, what "health complaints" the client seeks help with, whether he has seen "other doctors" for "this condition(s)," and for current and past prescription medications. During the EDT procedure, the client sits across a desk from the "tester" who attaches the GSR device to the client and stimulates acupuncture points on the client's fingers with a Piezo stimulator. The tester takes an initial reading with nothing in the circuit, and then adds many different homeopathic dilutions consisting of foods, environmental substances and toxins to the circuit to determine if the client has energy imbalances or blockages. The client holds "the negative probe (a brass rod) of the instrument while [the] tester touches the positive probe to the [client's] opposite hand. Correct reading is based upon proper location of the acupuncture point, probe angle, probe pressure, probe stroke and smoothness of the reading." The tester then adds various nutritional supplements to the circuit "to determine if they are prone to re-balance or restore energy flows." A consultant does the second half of the testing, "reviewing the

client's health concerns, testing Other Disturbances, Energetically Weak Organs, Toxins, checking specific supplements to design a program, and explaining the program to the client." Positive EDT readings are recorded in writing on three different forms. There is a \$99 follow-up appointment that lasts about an hour and involves all the same testing but does not include all the explanations.

FN19. Our description of PHC's practice, including EDT, is based largely on their responses to the State's interrogatories.

¶ 12 Based on the EDT results for a given client, PHC employees fill out an "Electrodermal Test" form listing various specific deficiencies, such as vitamins, minerals, toxins and "other disturbances," including depression, stress and autoimmune problems. They fill out a "Food Avoidance List" checklist form listing the foods a client should avoid based on his EDT test. They also give the client a "Supplement Schedule" listing vitamins, minerals, herbs, digestive aids and homeopathic remedies the client should take based on his EDT results. PHC employees make the homeopathic dilutions themselves and sell clients supplements and homeopathic remedies.

#### A. Practice of Medicine

¶ 13 PHC argues the trial court erred by ruling that they practice medicine. Under RCW 18.71.011, a person practices medicine if, among other things, he or she

- (1) Offers or undertakes to diagnose, cure, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality; [or]
- (2) Administers or prescribes drugs or medicinal preparations to be used by any other person.

\*624 No person may practice or represent himself or herself as practicing medicine without first having a valid license to do so.<sup>FN20</sup> The legislature passed Chapter 18.71 as an exercise of

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the police power to protect the health and well-being of the people of Washington.<sup>FN21</sup>

FN20. RCW 18.71.021.

FN21. RCW 18.71.003(1)(2).

¶ 14 PHC asserts that they do not diagnose physical or mental conditions when they use EDT to determine the effects of particular substances on a person's energetic balances. They urge us to interpret the statute to exclude holistic, non-invasive health care, contending that a literal interpretation of the statute would cover virtually any service related to the human condition and would nullify related statutes' protections for oriental medicine, herbology, and nutritional counseling. The State argues that PHC's actual practices plainly fall within the statutory definition of practice of medicine. It contends there is no indication the legislature intended to cover only invasive diagnostic and treatment methods used for traditional western biomedical conditions when it regulated medical practice.

¶ 15 No cases interpret RCW 18.71.011(1), but an older Washington case provides useful analysis, and several other jurisdictions have grappled with issues similar to ours. In *State v. Greiner*, the State charged a chiropractor with practicing without the necessary certificate.<sup>FN22</sup> At that time, it was a misdemeanor for any person to practice "medicine and surgery, osteopathy, or any other system or mode of treating the sick or afflicted in the state of Washington" without a certificate.<sup>FN23</sup> Grenier had the complaining patient "remove her street clothing ... she diagnosed the patient's ailments with the aid of a vibrator; she manually manipulated the supposedly diseased parts; she prescribed a dietary for the patient; she collected a fee; and advised the patient to return for further manipulation." <sup>FN24</sup> Grenier argued that her methods were "adjustments" rather than "treatments" and that chiropractic science was not a subject for State regulation. The court held her explanation was a "mere play upon words," and that chiropractic science was

FN22. 63 Wash. 46, 114 P. 897 (1911).

FN23. *Id.* at 49, 114 P. 897.FN24. *Id.* at 51, 114 P. 897.

clearly a mode of treating the sick and afflicted. As such it is, by all authority, subject to regulation. To call the method of treatment "chiropractic" and the treatments given "adjustments" does not change its nature. If the practice has any beneficial purpose at all its purpose is to heal the sick and afflicted, and to regulate the practice of healing the sick and afflicted is unquestionably within the acknowledged powers of the state.<sup>FN25</sup>

FN25. *Id.* at 51-52, 114 P. 897.

¶ 16 In *People v. Cantor*, the California Court of Appeals considered whether a hypnotist practiced medicine.<sup>FN26</sup> The relevant statutory components were "practicing or attempting to do so, or advertising or a holding out as practicing, any system or mode of treating the sick or afflicted, or diagnosing, treating, or prescribing for any ailment, disease, disorder, or other mental or physical condition of any person." <sup>FN27</sup> Cantor advertised and told clients he would help with their headaches and weight problems. He tried to hypnotize them, put his hands on their heads in an attempt to relieve their conditions, and gave them instructions for self-hypnosis. He told them he was not a doctor. The court held that the evidence showed the defendant was "advertising, diagnosing and treating[.]" <sup>FN28</sup> It further stated:

FN26. 198 Cal.App.2d Supp. 843, 18 Cal.Rptr. 363 (1961).

FN27. *Id.* at 845, 18 Cal.Rptr. 363.FN28. *Id.* at 849, 18 Cal.Rptr. 363.

It is our considered opinion that, in the light of the record in this case, the practice of hypnotism as a curative measure or mode of procedure by one not licensed to practice medicine, amounts to the

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unlawful practice of medicine. While it may be that one day the use of hypnotism may be recognized sufficiently to warrant the Legislature \*625 to license that practice, to date it has not done so. To the extent that appellant employed or attempted to practice his hypnotic powers, he was practicing medicine within the meaning of [the statute].<sup>[FN29]</sup>

FN29. *Id.* at 850, 18 Cal.Rptr. 363.

¶ 17 In *People v. Amber*, the New York Supreme Court had to decide whether acupuncture fell within the following statutory definition of the practice of medicine: “diagnosing, treating, operating, or prescribing for any human disease, pain, injury, deformity or physical condition.”<sup>FN30</sup> Amber argued that acupuncture was a unique treatment method not contemplated by the law and that only “Western allopathic medicine” fell within the statute.<sup>FN31</sup> The court described acupuncture in detail based on a treatise provided by the defendant and acknowledged that it was a method and theory quite different from typical western medical treatment. But the court held that “a statute intended to regulate, limit or control the diagnosis and treatment of ailments must necessarily be broad enough to include the gamut of those known, whether or not recognized and even those not yet conjured.”<sup>FN32</sup> It stated that it found

FN30. 76 Misc.2d 267, 268, 349 N.Y.S.2d 604 (1973) (quoting N.Y. Education Law § 6521). The statute had retained its broad language since it was enacted in 1907. *Id.* at 269, 349 N.Y.S.2d 604.

FN31. *Id.* at 273, 349 N.Y.S.2d 604.

FN32. *Id.*

nothing in the pertinent provisions of the [statute] which exclude, directly or by implication, any manner of diagnosis or treatment which is not embraced within the definition of “Western allopathic medicine”.... Whether actions constitute the practice of medicine is dependent upon the facts

and not upon the name of the procedure, its origins or legislative lack of clairvoyance.<sup>[FN33]</sup>

FN33. *Id.*

Importantly, the court noted that despite the defendant's detailed description of acupuncture, he had

scrupulously avoided [ ] the fact that a patient is necessarily involved and that such patient seeks treatment, not out of curiosity but only because he is suffering pain or other physical ailment; that before he, the patient, can expect the anticipated relief from the harmonious workings of the dual forces of Yin and Yang, a diagnosis must be made, if not to recognize a “Western” disease, then at least to determine the existence of a disharmony brought about by the disequilibrium of Yin and Yang; that a proper diagnosis or determination necessarily involves an expert ability to palpate the 12 pulses in order to read the condition of the 12 organs and thus determine which of the 12 meridians must be used to convey the Yin and Yang to the seat of disharmony with the object of restoring the vital essence of “ch'i”, which is described as an harmonious mixture of Yin and Yang....<sup>[FN34]</sup>

FN34. *Id.* at 274, 349 N.Y.S.2d 604.

The court concluded, “[i]t may be, in fact, that acupuncture as a separately licensed healing modality is an idea whose time has come. It is not, however, for this court to declare its arrival. That task is for the Legislature.”<sup>FN35</sup>

FN35. *Id.* at 275, 349 N.Y.S.2d 604. *Accord*, *People v. Roos*, 118 Ill.2d 203, 113 Ill.Dec. 81, 514 N.E.2d 993 (1987).

¶ 18 In *People v. Rogers*, defendant alternative health practitioner hooked clients up to a Phazx machine, a computer-based machine which used electrical impulses with attachments secured with Velcro.<sup>FN36</sup> The defendant assessed the conditions of various organs based on the machine's

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readings and recommended various dietary and exercise changes, along with remedies which she sold to the clients, based on the conditions the machine indicated. Michigan defined the “practice of medicine” as the

FN36. 249 Mich.App. 77, 641 N.W.2d 595 (2001).

“diagnosis, treatment, prevention, cure or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding \*626 oneself out as able to do, any of these acts.” [FN37]

FN37. *Id.* at 92, 641 N.W.2d 595 (quoting MCL 333.17001(1)(d)).

Rogers argued only that Michigan's statutory definition of “practice of medicine” was overbroad and void for vagueness. There was no question her conduct constituted the practice of medicine under the statute. The Michigan Court of Appeals held that previous court decisions had narrowed the statute sufficiently to make it constitutional.<sup>FN38</sup>

FN38. *Id.* at 101, 641 N.W.2d 595. PHC mentions that there are obvious constitutional issues in this case, but cite the Rules of Appellate Procedure limitations as the reason why they provide no supporting argument.

[3] ¶ 19 As in these cases, under the plain language of the statute, PHC employees do practice medicine. They offer services to people with various afflictions and tell them they can help them feel better. Appellants maintain that they merely identify and treat energetic, or “Qi,” imbalances rather than actual physical or mental conditions. But they represent that they can help people with arthritis, immune deficiencies, high cholesterol, and other physical conditions. They say in their brochure that they can help with “problems” such as

candida, headaches, depression, PMS, infections, and osteoporosis. They use EDT to test for nutrient and mineral deficiencies, energetically weak organs, toxicities, and food and environmental sensitivities. EDT is the “means or instrumentality” they offer and use to find and advise on these conditions. Based on the EDT results, appellants fill out a checklist identifying a client's conditions, not the client's “Qi” levels. They then suggest, mix, and sell remedies intended to help relieve or cure those conditions. As appellants describe it, “Qi” is inextricably linked with physical and mental conditions. Further, the “Superbill” appellants provide clients includes a section titled “Diagnostic Categories” that lists various conditions and ailments including allergy, P.M.S., fibromyalgia, and multiple vitamin deficiencies. These conditions are assigned codes that correspond to classification numbers used by medical professionals when billing insurance companies.

¶ 20 PHC's terminology may differ from that of mainstream Western medicine, but ultimately they offer and use EDT to determine, or “diagnose,” physical conditions or potential conditions, and then they suggest and provide remedies to address, or “treat,” those conditions. They may diagnose conditions by analyzing energy levels, but they still diagnose conditions. As the *Amber* court stated, “[w]hether actions constitute the practice of medicine is dependent upon the facts and not upon the name of the procedure, its origins, or legislative lack of clairvoyance.”<sup>FN39</sup> As in *Amber*, PHC's clients, or “patients,” come to them for treatment because they suffer pain or discomfort or some other physical or mental manifestation, not because their “Qi” is out of balance. Before those clients can obtain the relief expected from a balanced “Qi,” PHC employees must make a diagnosis, if not to recognize a “Western” condition, then at least to determine the existence of an imbalance brought about by various sensitivities or deficiencies.

FN39. 76 Misc.2d at 273, 349 N.Y.S.2d 604.

[4] ¶ 21 Nothing supports PHC's view that the statute is intended to cover only diagnoses of



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serious conditions or invasive biomedical advice. Nor does anything demonstrate that the legislature intended to include only traditional Western medicine practices in its definition of “practice of medicine.” We acknowledge appellants’ concern that the statute’s plain language could allow the State to regulate many practices the legislature could not have intended to regulate, such as elementary school teachers instructing students on health and hygiene or a Pilates instructor advising a client to hold in her stomach to prevent lower back pain. But those situations are not before us. Using EDT as an instrumentality to determine, or “diagnose,” medical conditions in a patient and then recommending and selling specific remedies to that person to address those conditions, are practices that unquestionably fall within the valid police power the legislature exercised when it regulated the practice of medicine.

\*627 ¶ 22 PHC argues that even if their actions fall under the plain language of the statute, related statutes and trends in public policy indicate the legislature could not have intended to require that they be licensed.<sup>FN40</sup> They contend the legislature intended that citizens have the freedom to choose alternative medicine practices. The State points out that Washington does so by licensing various “alternative” practices, including naturopathy, acupuncture, and massage. As the State argues, the legislature chose to license alternative health care to protect consumers from deceptive or harmful practices.

FN40. Appellants cite various papers and declarations extolling the virtues and validity of EDT. But the validity of EDT is not at issue in this case.

¶ 23 RCW 18.71.030 enumerates 14 exemptions to the statute, including some activities which constitute the practice of medicine, such as dentistry and naturopathy, but which may be performed under another license.<sup>FN41</sup> No one at PHC is licensed in any discipline, so this provision does not apply to them. RCW 18.36.050 lists four exemptions from the practice of naturopathic medicine, including the “practice of oriental

medicine or oriental herbology, or the rendering of other dietary or nutritional advice.”<sup>FN42</sup> But those exemptions only apply to the identified practices and do not exempt other practices, such as EDT, from licensure requirements. The same logic applies to the acupuncture statute, chapter 18.06 RCW, which excludes from acupuncture licensure requirements dietary advice based on oriental medical theory provided it is not given in conjunction with certain listed techniques.<sup>FN43</sup> But, again, PHC is not merely giving dietary advice. PHC also cites the Dietitians and Nutritionists statute, chapter 18.138 RCW, which excludes health food stores from licensing requirements.<sup>FN44</sup> But the same problem arises because PHC is not merely operating a health food store. Simply because some of their practices taken alone, would not require a license, does not mean they may engage in other activities which require one.

FN41. RCW 18.71.030(4).

FN42. RCW 18.36A.050(4).

FN43. RCW 18.06.010(1)(k).

FN44. RCW 18.138.110.

¶ 24 PHC contends that the “idea whose time has come is to allow alternative providers to provide health care for those who increasingly want it without being hampered by regulation.” They point to other states that have enacted legislation allowing alternative providers to practice without a license provided their actions are not invasive. But our legislature has not yet embraced that policy. Even if EDT as a separately licensed, or even unregulated, health care modality is indeed an idea whose time has come, we must leave that decision to the legislature. PHC’s actions constitute the practice of medicine under RCW 18.71.011.

#### *B. Practice of Naturopathy*

¶ 25 The legislature passed the naturopathy act, chapter 18.36A RCW, because it found it “necessary to regulate the practice of naturopaths in

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order to protect the public health, safety, and welfare.” <sup>FN45</sup> The legislature defines the practice of naturopathy broadly to include

FN45. RCW 18.36A.010.

manual manipulation (mechanotherapy), the prescription, administration, dispensing, and use, except for the treatment of malignancies, of nutrition and food science, physical modalities, minor office procedures, homeopathy, naturopathic medicines, hygiene and immunization, nondrug contraceptive devices, common diagnostic procedures, and suggestion.... <sup>FN46</sup>

FN46. RCW 18.36A.040.

Nutrition and food science “means the prevention and treatment of disease or other human conditions through the use of foods, water, herbs, roots, bark, or other natural food elements.” <sup>FN47</sup> A license is required to practice naturopathy. <sup>FN48</sup> As noted above, the statute exempts the practice of oriental medicine\*628 or herbology, or rendering other dietary or nutritional advice. <sup>FN49</sup>

FN47. RCW 18.36A.020(6).

FN48. RCW 18.36A.030(1).

FN49. RCW 18.36A.050(4).

[5] ¶ 26 PHC argues their practice consists primarily of nutritional counseling and oriental medicine. But they prescribe and mix specific homeopathic remedies based on a specific client's EDT results. They intend that those remedies will prevent and treat the particular conditions EDT indicates are present. They also put together food avoidance lists based on the EDT results. Because they do more than simply recommend homeopathics or render nutritional advice, PHC employees practice naturopathy under RCW 18.36A.040.

### C. Acupuncture

¶ 27 The legislature defines “acupuncture” as a “health care service based on an Oriental system of medical theory utilizing Oriental diagnosis and treatment to promote health and treat organic or functional disorders by treating specific acupuncture points or meridians.” <sup>FN50</sup> Acupuncture includes, among other things, the “[u]se of electrical, mechanical, or magnetic devices to stimulate acupuncture points and meridians,” and “[d]ietary advice based on Oriental medical theory provided in conjunction” with certain techniques including electrical stimulation of acupuncture points and meridians. <sup>FN51</sup> Acupuncturists must be licensed. <sup>FN52</sup>

FN50. RCW 18.06.010(1).

FN51. RCW 18.06.010(1)(b), (k).

FN52. RCW 18.06.020(1).

[6] ¶ 28 PHC argues they do not practice acupuncture because they do not use EDT to treat anything. They acknowledge that they use a “Piezo stimulator” in the EDT process to mildly, non-invasively stimulate acupuncture points and meridians. But because this stimulation merely awakens the points and meridians for measurement purposes rather than treatment, it is not as professional acupuncture. However, the plain language of the statute requires only that the electrical devices “stimulate acupuncture points and meridians” to qualify as acupuncture. It does not require that the electrical device actually treat anything. <sup>FN53</sup> PHC employees practice acupuncture under RCW 18.06.010.

FN53. RCW 18.06.010(1)(b).

### II. Consumer Protection Act

[7] ¶ 29 The CPA prohibits unfair or deceptive trade practices. <sup>FN54</sup> Where there is no dispute about what a party does in its trade or business, whether those actions constitute an unfair or deceptive trade practice under the CPA is an issue of law this court reviews de novo. <sup>FN55</sup> Conduct

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need not be intentional to be unfair or deceptive as long as it has "the capacity to deceive a substantial portion of the public."<sup>FN56</sup> The legislature has explicitly stated which statutory violations are per se CPA violations.<sup>FN57</sup> The unlawful practice of medicine is not a per se violation of the CPA.<sup>FN58</sup>

FN54. RCW 19.86.020.

FN55. *Robinson v. Avis Rent A Car Sys.*, 106 Wash.App. 104, 114, 22 P.3d 818 (citing *Leingang v. Pierce County Med. Bureau*, 131 Wash.2d 133, 150, 930 P.2d 288 (1997); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 560, 825 P.2d 714, review denied, 120 Wash.2d 1002, 838 P.2d 1143 (1992); *Grayson v. Nordic Constr. Co.*, 22 Wash.App. 143, 148-49, 589 P.2d 283 (1978), reversed on other grounds, 92 Wash.2d 548, 599 P.2d 1271 (1979)), review denied, 145 Wash.2d 1004, 35 P.3d 381 (2001).

FN56. *Bowers*, 100 Wash.2d at 592, 675 P.2d 193 (citing *Haner v. Quincy Farm Chems., Inc.*, 97 Wash.2d 753, 759, 649 P.2d 828 (1982)).

FN57. See, e.g., RCW 19.190.030(3) (a violation of the Commercial Electronic Mail Act constitutes "an unfair or deceptive act in trade or commerce ... for the purpose of applying the consumer protection act."); RCW 19.146.100 (a violation of the Mortgage Brokers Practices Act is a CPA violation); RCW 19.178.110 (a violation of the Going Out of Business Sales Act is a CPA violation); RCW 19.16.440 (collection agencies operating without a license or committing acts prohibited by the governing statute violate the CPA).

FN58. See *State v. Schwab*, 103 Wash.2d 542, 548-49, 693 P.2d 108 (1985) (violations of statutes promulgated in the public interest do not constitute per se

CPA violations) (citing *Haner*, 97 Wash.2d at 761-63, 649 P.2d 828).

¶ 30 In *Bowers v. Transamerica Title Insurance Co.*, the Washington Supreme Court \*629 held that Transamerica's closing agents' preparation of certain closing documents constituted the practice of law, and that by preparing the documents the closing agents represented that they had the legal competence to do so.<sup>FN59</sup> The court held that

FN59. 100 Wash.2d 581, 675 P.2d 193 (1983).

[p]otential clients might readily and quite reasonably believe that Transamerica's closing agents were qualified to provide the expertise that could be expected from a lawyer. Such a belief, though reasonable, is not well founded. In fact, the record is clear that the closing agents possessed no such expertise. Transamerica's conduct was therefore unfair and deceptive.<sup>FN60</sup>

FN60. *Id.* at 592, 675 P.2d 193.

The *Bowers* plaintiffs were damaged because Transamerica's unauthorized practice of law induced them to close real estate transactions without consulting legal counsel, who could have informed them of dangers inherent in the transactions.<sup>FN61</sup>

FN61. *Id.*

¶ 31 The State maintains that it does not allege a per se violation of the CPA. Rather, it argues that PHC violates the CPA by engaging in practices limited by law to licensed health care professionals. It also contends PHC has the capacity to deceive the public because, like the defendants in *Bowers*, they engage in practices for which they represent they have the expertise and training that only licensed professionals possess. PHC argues that even if their actions constitute the practice of medicine, that does not necessarily mean what they do has the capacity to deceive a substantial portion

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of the public. The trial court relied on *Bowers* in ruling that PHC violated the CPA.

¶ 32 Appellants represented themselves as being skilled in EDT and providing remedies based on EDT results. The State essentially argues that claim alone has the capacity to deceive consumers if the party's actions constitute the practice of medicine. In other words, when an unlicensed entity claims to and does perform some act covered by the practice of medicine statute, he or she is inherently less skilled than was represented to the public. This, the State asserts, is by definition a deceptive practice. But that does not account for people who, although unlicensed, have represented what they do correctly. The State effectively asks this court to adopt a per se rule that any unlicensed person who represents himself as skilled in a health practice modality violates the CPA if that modality constitutes the practice of medicine, regardless of whether his actual skill level matches his representations. That is not what *Bowers* held.

¶ 33 The defendants in *Bowers* represented that they were skilled in preparing closing documents, which constituted the practice of law, when in fact they were not. The crucial point for our CPA analysis is not simply that they were unqualified to practice law, but rather that the record demonstrated they were, in fact, not skilled in preparing the very closing documents they held themselves out as qualified to prepare. It was not their unlicensed practice of law itself that violated the CPA, as that would be a per se violation, but instead their lack of skill in preparing and advising clients about the meaning of those documents.

[8] ¶ 34 Here, PHC employees used EDT to diagnose and treat conditions. This constitutes the practice of medicine, but the State has not proved they were in fact not skilled in using EDT. To prove a deceptive practice, the State must demonstrate that PHC employees were not skilled in doing what they represented to the public they could do. Instead, the State relies solely on the fact that appellants were not licensed as proof that they misrepresented their skill level. *Bowers* is not broad enough to support the State's position. *Bowers* held that by preparing closing documents,

the defendants had represented to the public that they were competent to prepare those documents when they were not. Their false representation of their level of competence was the deceptive practice for CPA purposes, not their unauthorized practice of law. Competence to perform a particular act and being licensed to perform that act are two different things. A party practicing law or medicine \*630 without a license does not deceive the public if they do not claim to be licensed and are, in fact, competent or skilled in doing what they represent they can do. Someone who practices law or medicine without a license is not necessarily incompetent to perform the service that constitutes the practice of law or medicine. Under *Bowers*, the issue is whether that person in fact misrepresented his or her level of competence.

¶ 35 PHC represented to the public that they were skilled in EDT and could help people with various problems and maladies. They specifically said they were not medical doctors and did not claim to be licensed to practice any discipline. To prove a CPA violation, the State had to show that PHC employees were not skilled in using EDT or helping people in the manner they represented. This the State failed to do. In fact, the record is replete with evidence that PHC's clients believed its employees were competent at what they did.

¶ 36 Further, although the State need not present evidence that PHC's practices actually caused harm, it has failed to produce any evidence that there is even a reasonable possibility of harm. PHC has practiced for over 15 years in Washington. In that time, the State has not received any consumer complaints. Indeed, the only input from citizens has been outrage that the State was prosecuting PHC. The State must at least demonstrate that appellants' actions have a reasonable possibility of causing harm. Because it has not done so, its CPA claim cannot stand.

¶ 37 The trial court erred by ruling that appellants violated the CPA. Thus, it also abused its discretion by ordering penalties under the CPA.

ATTORNEY FEES

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¶ 38 We award appellants reasonable attorney fees and costs because they are the prevailing party in the CPA action.<sup>FN62</sup>

FN62. The prevailing party in a CPA action may, in the discretion of the court, be awarded attorney fees and costs. RCW 19.86.080.

¶ 39 We affirm the trial court's ruling that appellants engaged in the practices of medicine, naturopathy, and acupuncture. We reverse the trial court's ruling that appellants violated the CPA and its award of penalties under the CPA. We remand for further proceedings consistent with this opinion.

WE CONCUR: ELLINGTON and COLEMAN, JJ.  
Wash.App. Div. 1, 2006.  
State v. Pacific Health Center, Inc.  
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NO. 35144-7-II

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

JOYCE M. TASKER,

Appellant,

v.

DEPARTMENT OF HEALTH,

Respondent.

CERTIFICATE OF  
SERVICE

I, Jacqueline K. Conway, hereby declare: I am over the age of 18 years and not a party to this action. My business address is 7141 Cleanwater Drive SW, P.O. Box 40109, Olympia, WA, 98504-0109.

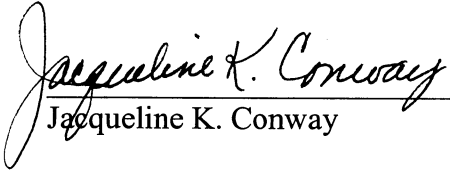
On the 27<sup>th</sup> day of December, 2006, I served a copy of the Brief of Respondent on appellant as follows:

☒ UPS Next Day Air & US Mail Postage Prepaid via Consolidated Mail Service to:

JOYCE M. TASKER  
2279 Marble Valley Basin Road  
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of December, 2006,  
at Olympia, Washington.

  
Jacqueline K. Conway